IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. ..... Miscellaneous

JESSIE A. KILPATRICK,

Petitioner,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent,

Ex Parte JESSIE A. KILPATRICK,

Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR CERTIORARI

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Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Jessie A. Kilpatrick, a resident of Alabama, moves the Court for leave to file the petition hereto annexed for a writ of mandamus or certiorari pursuant to Section 1651 (a) of the Judicial Code (28 U. S. C. A. 1651 (a)), and further moves that an order and rule be entered and issued directing the Honorable John C. Knox, United States District Judge for the Southern District of New York, to show cause why a writ of mandamus should not be issued in accordance with the prayer of the Petitioner,

and why the Petitioner should not have such other and further relief as may be just in the premises.

Dated: November 23, 1948.

JESSIE A. KILPATRICK,
Petitioner.

By: WILLIAM H. DEPARCQ,
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Counsel for Petitioner.

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—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent,

Ex Parte JESSIE A. KILPATRICK,

Petitioner.

PETITION FOR WRIT OF MANDAMUS OR CERTIORARI AND BRIEF IN SUPPORT THEREOF.

Petition

Jessie A. Kilpatrick prays for the issuance of a writ of certiorari to the District Court of the United States for the Southern District of New York, or for a writ of mandamus to the Honorable John C. Knox, United States District Judge for the Southern District of New York, directing the nullification of an order of the Honorable John C. Knox entered in the office of the Clerk of the District Court for the Southern District of New York on November 22, 1948 (Appendix page iii), which order provides for a transfer of the files in this action from the Southern Dis-

trict of New York to the District Court of the United States for the Northern District of Texas, and this writ of mandamus is sought upon the ground that the District Court does not have the power to make such an order.

Summary Statement of Matter Involved

Principal Question Passed on by the District Court

The District Court determined that it was empowered by Section 1404 (a) of the Judicial Code (28 U. S. C. A. 1404 (a)) to order the transfer of a case brought there under the Federal Employers' Liability Act (45 U. S. C. A. 51-56), and therefore applied the doctrine of *forum non conveniens* for the purpose of directing a transfer although the Supreme Court had previously decided that the choice of venue could not be frustrated in such a case by the application of the doctrine of *forum non conveniens*.

Summary of Facts

The Petitioner, while employed in interstate commerce by The Texas and Pacific Railway Company at Big Spring, Texas, was involved in an accident on November 20, 1946, as a result of which he lost both his legs. He filed suit pursuant to the Federal Employers' Liability Act in the United States District Court for the Southern District of New York on December 23, 1946.

This Court is fully familiar with the proceedings there. The case was dismissed on July 16, 1947 (72 F. Supp. 635). An appeal was taken to the Circuit Court of Appeals and the judgment of dismissal was reversed on March 4, 1948 (C. C. A. 2, 166 F. (2d) 788). The railroad petitioned this Court for certiorari which was denied on October 11, 1948 (No. 73).

On September 12, 1947, approximately nine months after instituting the New York action, Petitioner filed an action in the United States District Court for the Northern District of Texas, which Petitioner sought to dismiss in March, 1948. The Petitioner's motion to dismiss his action in Texas was unconditionally denied, an appeal was taken to the Fifth Circuit Court of Appeals and this Court has before it undetermined a petition for a writ of certiorari to the Fifth Circuit Court of Appeals and for a writ of prohibition to the District Court for the Northern District of Texas (Miscellaneous No. 119, No. 275).

Basis of Court's Jurisdiction

The jurisdiction of this Court is invoked pursuant to Section 1651 (a) (28 U. S. C. A., 1651 (a)), which provides that the Supreme Court and all Congressional courts may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.

Questions Presented

The principal questions involved are:

(A) Whether this is an appropriate case for the Court to exercise its power to issue all necessary writs (28 U. S. C. A. 1651(a) in the light of the facts that

(a) the matter involved lies outside the issues of the case,

(b) that no decision of the suit on the merits can redress any injury done by the order,

(c) that unless it can be reviewed under Section 1651 (a) it can never be corrected without irreparable

prejudice to Petitioner even though beyond the power of the District Judge and

(d) that the question involved is whether the court below had the judicial power to order the transfer.

(B) Whether Section 1404 (a) empowers a District Judge to vitiate the venue selection of an injured workman suing under the Federal Employers' Liability Act by directing a transfer to a venue other than that of his original choice. District Judge Rayfiel in the Eastern District of New York has answered this question in the negative in *Pascarella* v. *New York Central,* decided November 19, 1948 (see opinion in Appendix, pp. xv to xxiii).

Reasons Relied on for Allowance of Writ

By the Federal Employers' Liability Act (45 U. S. C. A. 51-56) Congress has thrown a humanitarian protective mantle about the shoulders of the injured railroad employee, and one of the advantages given the railroad man to partially offset the disadvantages of having to sue his employer to recover damages for injuries received in industrial accidents and the requirement that negligence be established is the right or privilege of venue selection in any place where the railroad is found to be doing business. This right or privilege has proved in practice to be of immeasurable value to the injured employee in getting away from judges considered to be unsympathetic and getting before those considered to be more favorable, in escaping courts with burdensome procedures and seeking out courts where procedures made the going simpler, and in getting away from juries thought to be small-minded in the matter of verdicts and getting to those where he felt he could reap the richest harvest.

If District Judges have the power to order transfers of Federal Employers' Liability Act cases on the ground of convenience to witnesses, this specially conferred right or privilege is completely frustrated. The question involved therefore transcends the interest of the Petitioner here, who has since December of 1946 been thwarted in its exercise but is a matter of national importance to thousands of other injured railroad employees and their dependents, and men still to be injured.

The question involved here of whether or not the District Judge has the power to order the transfer lies wholly without any of the issues in this case. Assuming that the case proceeds in Texas pursuant to the order of transfer and that judgment is ultimately recovered, that judgment will not redress any injury done by the order even though the order may have been beyond the power of the District Judge.

Section 1651 (a) is not being invoked to correct a mere error in the exercise of judicial power. The contention of the Petitioner is rather that the court has no judicial power to do what it has done and that its action was not merely error but a usurpation of power. It is respectfully submitted, therefore, that this is precisely a situation for invoking the power of this Court under Section 1651 (a). Public interest, furthermore, suggests its speedy determination.

Prayer

For the reasons hereinabove set forth and discussed more in detail with supporting authorities in the accompanying brief, your Petitioner prays for a writ of certiorari to the District Court for the Southern District of New York or a writ of mandamus, or such other writ as to this Court may

seem just and appropriate, to be issued out of this Court directed to the Honorable John C. Knox, United States District Judge for the Southern District of New York, commanding and directing said District Judge to nullify his order of November 22, 1948 transferring this cause out of the Southern District of New York to the Northern District of Texas, to the end that the District Court of the United States for the Southern District of New York and a judge thereof and a jury shall hear and consider the issues between Jessie A. Kilpatrick and The Texas and Pacific Railway Company.

November 23, 1948

JESSIE A. KILPATRICK,
Petitioner.

By: WILLIAM H. DEPARCQ
2535 Rand Tower
Minneapolis 2, Minnesota.

GERALD F. FINLEY and
ARNOLD B. ELKIND
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Counsel for Petitioner.

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THE TEXAS AND PACIFIC RAILWAY COMPANY,

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Ex Parte JESSIE A. KILPATRICK,

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OR MANDAMUS

Reported Opinions

The memorandum opinions of Judge Knox transferring this case to the Fort Worth Division of the United States District Court for the Northern District of Texas are dated November 12, 1948 and November 17, 1948. They are not officially reported but are printed in the Appendix hereto at pages i and ii.

There are also printed in the appendix representative divergent opinions of two District Judges, neither of which opinions is officially reported. The opinion of Judge Rayfiel of the United States District Court for the Eastern District

of New York, in *Pascarella* v. *New York Central Railroad Co.*, in which action Judge Rayfiel held that Section 1404 (a) is not applicable to actions brought under the Federal Employers' Liability Act, is printed in the Appendix (pp. xv to xxiii). The opinion of Judge Kaufman of the United States District Court for the Southern District of New York, in *Nunn* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, in which Judge Kaufman held that Section 1404 (a) was applicable to actions brought under the Federal Employers' Liability Act, is printed in the Appendix (pp. v to xiv).

The history and procedural background of the Kilpatrick litigation may be found by reference to the following published opinions and pending proceedings in this Court:

72 F. Supp. 632;
72 F. Supp. 635;
166 F. (2d) 788, cert. den. —— U. S. —— (October 11, 1948, No. 73).

The proceedings in which certiorari to the Second Circuit was denied by this Court were in "The Texas and Pacific Railway Company, Petitioner v. Jessie A. Kilpatrick, Respondent", being Nos. 839 and 840 in the October 1947 Term of this Court.

Other pending proceedings in this Court involving this litigation are Petitioner's Motion for Leave to File Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals and for a Writ of Prohibition to the District Court for the Northern District of Texas, being Miscellaneous No. 149, the actual petition being numbered 275 in the October 1948 Term of this Court.

Specification of Errors

It is contended that the District Judge erred in assuming that Section 1404 (a) of the Judicial Code (28 U. S. C. A. 1404(a)), which became effective on September 1, 1948, conferred upon him the power to transfer this action to Texas for the convenience of witnesses in spite of the fact that this action was brought under the Federal Employers' Liability Act (45 U. S. C. A. 51-56).

ARGUMENT

Statutes Involved

The statute bearing on the jurisdiction of the Court to issue a writ is Section 1651 (a) of the Judicial Code (28 U. S. C. A. 1651 (a)), which reads as follows:

> "The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."

If the Court grants its writ it will take the problem of construing whether Section 1404 (a) of the Judicial Code has application to cases brought pursuant to Section 6 of the Federal Employers' Liability Act. 1404 (a) of the Judicial Code, effective September 1, 1948 (28 U. S. C. A. 1404 (a)), provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been tried."

Section 6 of the Federal Employers' Liability Act (as amended in 1910 (45 U. S. C. A., 56)), in relevant part provides:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

POINT I

The Court should exercise its power to issue a writ to the District Court pursuant to Section 1651 (a) of the Judicial Code.

Section 1651 (a) carries with it the embodiment of former Section 262. The reviser's note to the new Section 1651 (a) states that the revised section is expressive of the construction recently placed upon such section by the Supreme Court in *U. S. Alkali Export Assn.* v. *U. S.*, 65 S. Ct. 1120, 325 U. S. 196 (1945) and *DeBeers Consol. Mines* v. *U. S.*, 65 S. Ct. 1130, 325 U. S. 212 (1945).

As is pointed out in *U. S. Alkali Assn.* v. *U. S.*, *supra*, the judicial use of these writs both at common law and in the Federal courts have been in appropriate cases to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so. The writ here is not sought

as a substitute for an authorized appeal. The question involved actually, as in the *DeBeers* case, *supra*, respects a matter lying wholly outside the issues in the case. Regardless of the ultimate verdict and judgment in this case, there will be no redress for the injury sustained by the plaintiff if in truth and in fact the court below lacked the power to issue the order of transfer. Petitioner is not asking this Court to review the question of whether or not the District Judge properly exercised his discretion in ordering this transfer; rather, the Petitioner contends that the Court had no judicial power but has instead usurped a power not available to it.

The situation which compelled this Court to issue a writ of certiorari to the District Court of the United States for the Southern District of New York in *DeBeers Consol. Mines* v. *U. S.*, 325 U. S. 212, 217, is not distinguishable in principle from the conditions here, with these additional factors:

(a) that the matter is of national importance to injured railroad employees throughout the country,

(b) that a prompt decision by this Court will prevent a dislocation of Federal Employers' Liability Act litigation throughout the United States,

(c) that in the particular case of this Petitioner it will enable the Court to pass on the question of whether, having established his right to bring an action in the Southern District of New York through two years of heart-breaking litigation, that choice is to be thwarted by the invocation of the doctrine of *forum non conveniens*,

(d) there are already differences of opinion between District Judges as to whether or not Section 1404 (a) is

to be applied to Federal Employers' Liability Act cases (compare the opinion of Judge Kaufman in the Southern District, decided on November 9, 1948, in *Nunn* v. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*—Appendix pages v to xiv, with the decision of Judge Rayfiel in the Eastern District in *Pascarella* v. *New York Central R.R.*, decided on November 19, 1948—Appendix pages xv to xxiii), and

(e) lacking guidance from this Court District Judges and litigants under the Federal Employers' Liability Act will be left in a veritable maze of procedural problems to obtain appellate review.

Ex Parte Republic of Peru, 318 U. S. 578.

POINT II

The District Judge has usurped power not conferred upon him by Section 1404 (a) of the Judicial Code in ordering a transfer of an action brought under the Federal Employers' Liability Act.

The section which the learned jurist believed conferred upon him the authority to order a transfer of this action was Section 1404 (a) of Title 28. This section became effective on September 1, 1948 as the result of a passage by Congress of Chapter 646, Public Law 773, an act "to revise and codify".

Concentrated in that revision in Chapter 87 thereof, dealing with venue in the District Court, are many special venue provisions theretofore found in various statutes of the United States. These provisions are appropriately grouped and restated. Significant omissions are the venue provision of the Federal Employers' Liability Act, the venue provision of the Jones Act (46 U. S. C. A. 688)

and the venue provision of the Anti-Trust Laws (15 U. S. C. A. 1-7).

The learned jurist determined that because of the broad language of the section in the Judicial Code the authority conferred upon the court to transfer actions for the convenience of witnesses extended beyond those cases the venue provisions of which are restated in the Judicial Code and included Federal Employers' Liability Act cases. The result accomplished would be to effectively thwart one of the humanitarian purposes of the Federal Employers' Liability Act, and specifically the special venue provision therein contained which was hallowed by the interpretations of this Court as a valuable right or privilege intentionally conferred upon the injured workman by Congress.

Baltimore & Ohio R. Co. v. *Kepner,* 314 U. S. 44 (1941);

Miles v. *Illinois Central R.R. Co.,* 315 U. S. 698 (1942);

Gulf Oil Corporation v. *Gilbert,* 330 U. S. 501, 503 (1947);

Kilpatrick and Parker v. *The Texas and Pacific Railway Co.,* 166 F. (2d) 788 (1948); cert. den. —— U. S. ——, October 11, 1948;

Akerly v. *New York Central R.R. Co.,* 168 F. (2d) 812 (1948).

The District Judge in reading this section of the Judicial Code has closed his eyes to the purpose of the enactment, to the considerations evidenced in the affiliated statute and to the known temper of legislative opinion.

A

Purpose of the Enactment

The purpose of the enactment of the Code as a whole was, in addition to codification, to revise by substituting "plain language for awkward terms, reconciliation of conflicting laws, repeal of superseded sections and consolidation of related proceedings" (House Report 308, 80th Congress, 1st Sess., Title 28 Congressional Service, p. 1693).

What minor changes were made in the provisions regulating venue were made "in order to clarify ambiguities or reconcile conflicts" (id. p. 1697).

B

Considerations Evidenced in the Affiliated Statute

The Court closed its eyes to the considerations evidenced in the interpretation of Section 6 of the Federal Employers' Liability Act by the Supreme Court of the United States, which affirmed the humanitarian purpose of the Federal Employers' Liability Act and which posturized the venue provision therein as a plain grant of privilege not to be frustrated for the reasons which would authorize a transfer under 1404 (a). While it is true that Congress would have the power to frustrate the choice of venue, it should be abundantly clear that before that plain grant of privilege could be vitiated by Congress an amendment would, of necessity, be required to the Act in which were embodied all of the other laws concerning the rights and privileges of injured railroad employees. Then and then only should the learned jurist below have presumed that Congress had conferred upon him the power to impinge upon or revise or affect those special rights and privileges.

C

The Known Temper of Legislative Opinion

The District Court, in assuming that Congress intended to disturb the field of private rights between railroad employees and railroads otherwise reposed in the Federal Employers' Liability Act, overlooked that this particular field was one of the most controversial fields of private rights and that Congress, in connection with the Jennings Bill during the very session in which the revision of the Judicial Code was passed, failed to pass other legislation affecting the choice of venue under the Federal Employers' Liability Act. (See opinion of Judge Rayfiel in *Pascarella* v. *New York Central R. R. Co.*—Appendix pages xv to xxiii).

In order to come to the conclusion that Section 1404 (a) was applicable the District Judge also had to disregard the applicable canon of construction against implied repeals (*Washington* v. *Miller*, 235 U. S. 422 (1914)), and many, many statements which were part of the legislative history of this enactment reported in Title 28, United States Code, Congressional Service, at pages 1676, 1941, 1945, 1950, 1972, 1981, 2019 and 2020. At these page references in the Congressional Service will be found the various assurances which were made to Congress that there was nothing in the proposed revision of the Judicial Code which was of a controversial nature, and which assurances induced Congress to pass the revision via the consent calendar and without debate. The interpretation placed upon 1404 (a) by the District Judge would, on the other hand, indicate that Congress had legislated on a most highly controversial subject.

The interpretation consistent with the representations made to Congress would be a codification of the rule expressed in *Gulf Oil Corporation* v. *Gilbert, supra*, which expressly excluded from the application of the doctrine of *forum non conveniens* actions brought pursuant to the special venue provision of the Federal Employers' Liability Act.

CONCLUSION

The Court should exercise its undeniable power to issue the writ sought and pass on this vitally important question of whether a Judge of the United States District Court now has the power to frustrate the selection of venue by an injured railroad employee.

Respectfully submitted,

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Dated: New York, November 23, 1948.

APPENDIX

Memorandum Opinion of Judge Knox dated November 12, 1948

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 40-170

JESSIE A. KILPATRICK,

Plaintiff,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY, a corporation,

Defendant.

KNOX, *D.J.*

Plaintiff's motion for a preference is denied. Plaintiff's alternative application for an order striking the answer of the defendant in the event that the defendant proceeds to trial in an action brought by the plaintiff against the defendant in the District Court of the United States for the Northern District of Texas, is also denied. Upon cross-motion by the defendant, under authority of Section 1404 (a) of Title 28 of the United States Code, this case is transferred to the Fort Worth Division of the United States District Court for the Northern District of Texas. *Hayes* v. *Chicago, Rock Island and Pacific Railroad Co.*, D. C. Minn., September 25, 1948 (unpublished); *Nunn* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, S. D. N. Y., November 9, 1948 (unpublished).

JOHN C. KNOX
U. S. D. J.

November 12, 1948

Memorandum Opinion of Judge Knox dated November 17, 1940

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 40-170

JESSIE A. KILPATRICK,

Plaintiff,

—*vs.*—

THE TEXAS AND PACIFIC RAILWAY COMPANY, a corporation,

Defendant.

KNOX, *DJ*

Notwithstanding the affidavit of William H. DeParcq, dated November 9, 1948, and that of Gerald F. Finley, dated November 11, 1948, and which were filed herein subsequent to November 12, 1948, when my memorandum herein, with respect to defendant's motion to transfer this case to the United States District Court for the Northern District of Texas, for trial, was filed, I shall adhere to the rulings set forth in such memorandum.

The aforesaid affidavits have been read and considered, but I do not regard them as sufficient to warrant a change in my decision of November 12, 1948.

JOHN C. KNOX,
U. S. D. J.

November 17, 1948

Order of Judge Knox dated November 22, 1948

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 40-170

JESSIE A. KILPATRICK,

Plaintiff,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Defendant.

The plaintiff having moved this Court, by notice of motion dated October 27, 1948, for an order of trial preference setting the above entitled action for trial, to appear as the first case assigned on the jury trial calendar of this Court of Monday, November 8, 1948, and

The defendant, pursuant to the direction of Honorable John C. Knox, having moved this Court by notice of cross-motion dated November 3, 1948, for an order transferring this action, pursuant to Section 1404 (a) of Title 28 of the United States Code, to the United States District Court for the Northern District of Texas, Fort Worth Division thereof, and

The motions having duly come on to be heard on the 5th day of November, 1948 before Honorable John C. Knox, and the Court having heard counsel for the plaintiff in support of the plaintiff's motion and in opposition to the defendant's cross-motion and in opposition to the plain-

tiff's motion, and due deliberation having been had thereon, and the Court having filed its opinions, dated November 12, 1948 and November 17, 1948, denying plaintiff's motion and granting defendant's cross-motion, it is,

ORDERED, that the motion of the plaintiff for an order of trial preference be, and the same hereby is, denied in all respects, and it is

FURTHER ORDERED, that the motion of the defendant be, and the same hereby is, in the exercise of this Court's judicial discretion in all respects granted, and the above entitled action be transferred to the United States District Court for the Northern District of Texas, Fort Worth Division, and that the Clerk of this Court, upon being presented with a copy of this order, shall during the week of January 17, 1949 forward all of the files in this action to the Clerk of the United States District Court for the Northern District of Texas, Fort Worth Division, together with a copy of this order, unless there shall be a further order of this Court or the Court of Appeals for the Second Circuit or the Supreme Court of the United States staying such direction and transfer.

Dated: November 22, 1948.

JOHN C. KNOX,
U. S. D. J.

Opinion by Judge Kaufman in Nunn v. Chicago, Milwaukee, St. Paul and Pacific R. Co., dated November 9, 1948

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 40-33

LLOYD B. NUNN,

Plaintiff,

—v.—

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY, a corporation,

Defendants.

OPINION

APPEARANCES:

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GERALD F. FINLEY, ESQ.
ARNOLD B. ELKIND, ESQ.
Of Counsel.

EDWARD T. WELCH, ESQ.,
Attorney for Defendant,
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KAUFMAN, *J.*

Plaintiff, a resident of Des Moines, Iowa, sues to recover for injuries suffered in an accident near Clive, Iowa, while he was in the employ of defendant. Defendant moves to transfer the case to the District Court for the Southern District of Iowa, Central Division. The motion presents the question of whether or not the change of venue provision of the new Judicial Code, effective September 1, 1948, Title 28, United States Code, Section 1404 (a), is applicable to actions brought under Section 6 of the Federal Employers' Liability Act, 45 U. S. C. A. 56.

Title 28, United States Code, Section 1404 (a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Section 6 of the Federal Employers' Liability Act reads as follows:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. * * *"

There is no controversy here, as to the following facts. The defendant has no lines of operation in or near New York. While it does maintain a fiscal office and offices for the solicitation of business in the Southern District of New York, its railroading operations are confined to the Middle and Northwest United States. In order to defend the in-

stant action, it will be necessary for defendant to bring from Des Moines or its vicinity to New York, a distance of some 1200 miles, twelve important witnesses, eight of whom are in defendant's employ, and four of whom are physicians who, at one time or another, treated plaintiff for the injuries alleged to have been sustained by him as a result of the accident. Not only will the absence of these employees interfere with the functioning of defendant's line in its Iowa division and greatly inconvenience the physicians involved, but it is estimated that the cost of trying the suit here will be from $4,000 to $5,000, or approximately five times as much as if the case were prosecuted in Iowa. While the case, if left here, will soon go to trial, the calendar in the District Court for the Southern District of Iowa, Central Division, is current and up to date and the case, if transferred, will be heard about the first of next year.

Plaintiff does not dispute that the trial of this case may proceed with greater ease and expedience if venue were laid in a forum closer to the residence of both the suitors and the witnesses. Rather the claim is made that the nature of the venue privilege granted by Section 6 of the Federal Employers' Liability Act and its judicial construction by the Supreme Court render it unlikely that Section 1404 (a) of the new Judicial Code was intended to apply to actions brought under Section 6 of the Federal Employers' Liability Act. This contention is not well founded.

In *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, the plaintiff, a resident of Ohio, brought suit in the Eastern District of New York under the Federal Employers' Liability Act to recover for injuries alleged to have been sustained by him. The railroad sought to enjoin the New York action by proceedings commenced in the State Court of Ohio. The Supreme Court held that the Federal Statute had created a privilege of venue which could not be frus-

trated by considerations of convenience or expense, and therefore a State Court, under its equity powers, could not enjoin an action begun in a distant federal forum in accordance with the provisions of the Act. A similar result was reached in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, where it was held that Section 6 also precluded a State Court from enjoining, on considerations of annoyance, convenience and harassment, a Federal Employers' Liability action in the courts of a sister state. Finally, in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, the Court declared (p. 505): "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*."

The foregoing cases are no longer controlling, or even applicable. Not only were they decided prior to the enactment of the new Judicial Code, when there was no provision of statute similar to 1404 (a), but the legislative history of Section 1404 (a) makes it abundantly clear that it was the very purpose of Congress, in enacting that section, to change the rule which had been approved by the decisions in those cases—a course indicated by the statement of the Supreme Court in the *Kepner* case, *supra*, p. 54, that if the rule "is deemed unjust, the remedy is legislative".

In considering the impact of Section 1404 (a) of Title 28 upon Section 6 of the Federal Employers' Liability Act, it must be recalled that Section 6 goes no further than to provide where the action "may be brought"; it does not say that the action, though properly "brought" in a certain forum, must remain there, and consequently there is no inconsistency between that section and Section 1404 (a) of the Code authorizing a transfer for the convenience of parties and witnesses in "any civil action". Moreover, there is no room for suggestion that Congress, in enacting the

venue provisions of the new Code, did not have in mind the rights of those protected by the Federal Employers' Liability Act. Such a suggestion is refuted by the provisions of Section 1445 (a) of Title 28 relating to removal of actions, in which a general prohibition is laid down against the removal to the federal courts of civil actions brought in state courts under the Federal Employers' Liability Act.

The revisor's note to Section 1404 (a) is indicative of the intention of the legislature and reads as follows:

> "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." Title 28, United States Code, Congressional Service, p. 1853.

The attention of the legislators was specifically directed to the revisor's notes with regard to contemplated changes in venue provisions in the new Judicial Code (H. Rep. 308, Title 28, United States Code, Congressional Service, p. 1692, at p. 1697, which accompanied H. R. 3214, later enacted into the new Code; Statement of Rep. Eugene J. Keogh, Hearing before Subcommittee No. 1 of the House Judiciary Committee on H. R. 1600 and H. R. 2055, Title 28, United States Code, Congressional Service, pp. 1947-1948) and Judge Galston, a Member of the Judicial Conference Committee

on Revision of the Judicial Code, refers to the *Kepner* case in connection with the drafting of the change of venue section (Galston, An Introduction to the New Federal Judicial Code, 8 F. R. D. 201, 206). These references to the *Kepner* case leave no doubt that the new Section 1404 (a) was enacted with the express purpose in mind of changing the pre-existing rule that in cases under the Federal Employers' Liability Act the plaintiff's choice of a forum could not be defeated on the basis of *forum non conveniens.*

Professor Moore, author of Moore's Federal Practice, and special consultant on the revision of the Judicial Code to the publishers of the United States Code, Annotated, speaking before the House Subcommittee holding hearings on H. R. 2055, the forerunner of H. R. 3214, the final draft of the new Code, indicated clearly the change made in venue provisions. He said:

> "Venue provisions have not been altered by the revision. Two changes of importance have, however, been made. Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead the district court is to transfer the case to the proper venue. See section 1406. And section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice; and the provision for change of venue on the grounds of convenience is also embodied in the Bankruptcy Act for corporate reorganization, section 118, Eleventh United States Code, section 518." (Hearings before Subcommittee No. 1 on H. R. 2055, Title 28, United States Code, Congressional Service, p. 1969.)

Professor Moore's views are weighty, not only because of his eminence in this field generally, but because, as consultant to the publishers of the Annotated Code, he was adviser to those who, in collaboration with the Congressional Committee on Revision of the Laws, were entrusted with the preparation of the bill which became Title 28 (See letter from Hon. Harvey T. Reid, Editor-in-Chief of West Publishing Co., Hearings before Subcommittee No. 1 on H. R. 2055, Title 28, United States Code, Congressional Service, 1971-1972; Remarks of Representative Sam Hobbs, Title 28, United States Code, Congressional Service, p. 1986, and Floor Discussion, id, p. 1993).

There is already authority for the application of Section 1404 (a) of the new Code to cases arising under Congressional statutes allowing the plaintiff the privilege of selecting his forum. While the Supreme Court, prior to the enactment of the new Code, in *United States* v. *National City Lines*, 334 U. S. 573, held that the judicial doctrine of *forum non conveniens* was not applicable to suits where venue is chosen pursuant to Section 12 of the Clayton Act, District Judge Yankwich in the District Court for the Southern District of California subsequently applied Section 1404 (a) in that very case and transferred the action to a district more suitable. *United States* v. *National City Lines*, 17 U. S. L. W. 2167 (October 12, 1948). Similarly, in an excellent opinion by Judges Nordbye and Joyce in the District Court of Minnesota, Section 1404 (a) has been held applicable to an action instituted to recover for injuries under the Federal Employers' Liability Act. *Hayes, et al.* v. *Chicago, Rock Island and Pacific Railroad Company* (unpublished opinion, District Court for the District of Minnesota, Fourth Division, September 25, 1948).

Plaintiff points out that the Jennings Bill,[1] also before the 80th Congress, and specifically designed to remedy the frequent inequity in bringing suits in distant and unsuitable forums under the venue provisions of the Federal Employers' Liability Act, was not enacted, and from this plaintiff argues that it cannot be assumed that Section 1404 (a) of the Judicial Code was intended to apply in such cases.

Why the Jennings Bill was not enacted, seems immaterial, but it is entirely possible that Congress felt such a law unnecessary for the very reason that such change as was deemed desirable would follow from Section 1404 (a) of the new Code. Moreover, the proposed Jennings Bill was in no sense a mere statutory enactment of the doctrine of *forum non conveniens*. It was designed to require suit to be brought in the jurisdiction in which the cause of action arose, or in which the person suffering death or injury resided at the time it arose, and to withdraw from the plaintiff any choice of forum except in cases where the de-

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1. The Jennings Bill provided that the second paragraph of Section 6 of The Federal Employers' Liability Act be amended by eliminating the broad power of the plaintiff to select the forum in which the action would be tried. It then proceeded to amend Section 51 of the old Judicial Code (28 U. S. C. 112) as follows:

> "A civil suit for damages for wrongful death or personal injuries against any interstate common carrier by railroad may be brought only in a District Court of the United States or in a State Court of competent jurisdiction, in the district or county (parish), respectively, in which the cause of action arose, or where the person suffering death or injury resided at the time it arose:
>
> "*Provided,* that if the defendant cannot be served with process issuing out of any of the Courts aforementioned, then and only then, the action may be brought in a District Court of the United States, or in a State Court of competent jurisdiction, at any place where the defendant shall be doing business at the time of the institution of said action."

The bill was passed by the House, 93 Cong. Rec., 9193, but only reached committee stage in the Senate.

fendant could not be reached with process in either of the two aforementioned jurisdictions. No such situation is created by the new Judicial Code. The plaintiff is still allowed, under Section 6 of the Federal Employers' Liability Act, to select, from all the forums in the country permitted him under the statute, that one which seems to him most preferable. But the legislative history of the Judicial Code and the broad language of Section 1404 (a) demonstrate that such choice on his part does not exempt him from the power of the court, after due consideration of the convenience of witnesses, parties and the interests of justice, to transfer the case to a more suitable place for trial.

The contention made by the plaintiff that the new Judicial Code was not intended to apply to pending actions is not sound. Not only would such a holding interject into every case in which the new Code is to be applied the extraneous, and sometimes difficult, issue of whether or not the case is "pending" [See *Truncale* v. *Universal Pictures Corp.*, 11 Fed. Rules Serv. 24 c 3, Case 1; *Russo* v. *Sofia Bros.*, 2 F. R. D. 80; *Liken* v. *Shaffer*, 64 F. Supp. 432; *Hackner* v. *Guaranty Trust Co. of New York*, 117 F. (2d) 95], but it would be contrary to the generally accepted rule that statutes relating to procedure apply to pending as well as future actions. *Railroad Co.* v. *Grant*, 98 U. S. 398; *Hallowell* v. *Commons*, 239 U. S. 506; *Bemis* v. *Maher*, 128 F. (2d) 247. So far, the courts have treated the new Judicial Code in no different manner from any other procedural legislation in this respect. See *United States* v. *National City Lines, supra; Hayes, et al.* v. *Chicago, R. I. & P. Rd. Co., supra.*

Section 1404 (a) is applicable to this case, despite the fact that venue is laid under Section 6 of the Federal Employers' Liability Act. The facts plainly indicate that the transfer is necessary for the convenience of the parties and

witnesses and that it is in the interest of justice that the transfer be made. The case is therefore transferred to the District Court of the United States for the Southern District of Iowa, Central Division.

Plaintiff's cross-motion for injunction is denied. Settle order on notice.

November 9, 1948.

SAMUEL H. KAUFMAN
United States District Judge

Opinion of Judge Rayfiel in Pascarella v. New York Central dated November 19, 1948

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 8942

JOHN A. PASCARELLA,

Plaintiff.

—VS.—

THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendant.

OPINION

APPEARANCES:

C. AUSTIN WHITE, ESQ.,
Attorney for Defendant,
For the Motion.

MESSRS. BLANK & BORDEN,
Attorneys for Plaintiff,
By WILLIAM A. BLANK, ESQ., of Counsel,
In opposition to Motion.

RAYFIEL, *D. J.*:

The plaintiff, an employee of the defendant railroad company, commenced this action under the Federal Em-

ployers' Liability Act (United States Code, Title 45, Sections 51 et seq:) to recover damages for injuries sustained by him during the course of his employment.

The defendant now moves for an order transferring the said action to the United States District Court for the Northern District of Ohio, Eastern Division thereof. The said motion is made pursuant to the provisions of Section 1404(a) of Title 28 of the United States Code, which became effective on September 1, 1948. The said section provides that a District Court may, "for the convenience of parties and witnesses, and in the interest of justice, transfer any civil action to any other district or division where it might have been brought."

The defendant states that the plaintiff, a resident of Ohio, suffered the injuries which are the subject matter of this action while working as a brakeman in Youngstown, Ohio; that the defendant expects to call as witnesses on the trial of the action several members of the train crew of which the plaintiff was a member, as well as several car inspectors and physicians, all of whom are employed or reside in or near Youngstown, Ohio; and that the United States District Court for the Northern District of Ohio, Eastern Division thereof, is held in the City of Youngstown, Ohio.

The plaintiff opposes this motion, contending, first, that the said Section 1404(a) does not apply to actions brought under the Federal Employers' Liability Act, and, second, that if it should be held that it does, then it is not applicable to actions pending on its effective date, to-wit, September 1, 1948.

For many years the doctrine of "forum non conveniens" has been enforced in the Federal Courts, but it has been uniformly held that it is inapplicable to actions brought under the Federal Employers' Liability Act. In the case of

Baltimore & Ohio R. R. Co. v. *Kepner*, 314 U. S. 44, the Court, referring to Section 6 of the said Act, said (at page 54), "* * * a privilege of venue granted by the legislative body which created this right of action cannot be frustrated by reasons of convenience or expense. If it is deemed unjust the remedy is legislative * * *" To the same general effect, see also *Miles* v. *Illinois Central R. R. Co.*, 315 U. S. 698, and *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501. In the latter case, an ordinary tort action, not brought under the Federal Employers' Liability Act, the Court, in applying the doctrine of "forum non conveniens," said (at page 505), "It is true that in cases under the Federal Employers' Liability Act we have held that the plaintiff's choice of a forum cannot be defeated on the basis of 'forum non conveniens.' But this was because the special venue act under which these cases are brought was believed to require it". *Baltimore & Ohio R. R.* v. *Kepner*, 314 U. S. 44; *Miles* v. *Illinois Central R. R.*, 315 U. S. 698.

No question is raised as to this Court's jurisdiction of this action or of the parties. There are two questions involved here: first, whether Section 1404(a) of Title 28 of the United States Code applies to all civil actions, including actions brought under the Federal Employers' Liability Act; and, second, whether the defendant has established reasons of convenience of parties and witnesses which would justify the transfer of this action. If the first question is answered in the negative the second need not be considered.

Since no specific reference is made in the new Title 28 of the United States Code to actions brought under the Federal Employers' Liability Act, it becomes necessary to ascertain what the Congress intended when it enacted Section 1404(a) of Title 28 of the United States Code. All of the provisions of Title 28 of the new Code appear in one

chapter, headed "Chapter 87—District Courts; Venue," consisting of Sections 1391 to 1406, inclusive. The first section (1391) deals with venue generally, while several of the remaining sections contain provisions for venue in other specific civil actions, such as actions (1) by a national banking association against the comptroller of the currency, (2) to recover a fine, penalty or forfeiture, (3) for the collection of internal revenue taxes, and several others. It is my opinion that the provision in the said Section 1404(a) authorizing the District Court to transfer "*any* civil action * * *" (emphasis added) refers only to the civil actions enumerated under the aforementioned Chapter 87, and not to those actions for which special venue provisions and privileges are created by statute, except, of course, those venue statutes which were specifically repealed by the new Code.

Section 39 of the enacting act of New Federal Judicial Code reads in part as follows:

> "The sections or parts thereof of the Revised Statutes of the United States or statutes at large enumerated in the following schedule are hereby repealed."

There follows a schedule comprising many hundreds of sections of various statutes, but neither Section 6 nor any other provision of the Federal Employers' Liability Act appears among them.

Where the Congress did intend to make Section 1404(a) applicable to statutes containing specific venue provisions it accomplished that purpose in unmistakable language. For instance, it provided (by Section 1400(a) of Title 28, under the heading "Chapter 87—District Courts; Venue") that the transfer procedure effected by Section 1404(a)

should apply to copyright cases and consequently repealed Section 35 of Title 17, providing therefor.

An examination of the reviser's notes and the hearings and report of the committee which considered the bill which eventually became the New Federal Judicial Code, indicates that the various sections under Chapter 87 thereof (affecting venue), were intended to effect completeness or clarity in the statutes which they were designed to replace, or provided changes in the phraseology thereof. Specifically, Section 1404, according to the said notes, was a consolidation of Sections 119 and 163 of Title 28, U. S. C., 1940 Ed. with necessary changes in phraseology and substance, and neither of said sections referred to actions commenced under the Federal Employers' Liability Act. The mere reference in said notes to the case of *Baltimore & Ohio R. R. Co.* v. *Kepner, supra*, does not justify the conclusion that the Congress intended by said section to deprive an employee of a railroad of the special and substantive right of venue granted him by Section 6 of the Federal Employers' Liability Act.

Hon. John Jennings, Jr., a member of the House of Representatives, introduced a bill in the first session of the 80th Congress (H. R. 242) providing for the amendment of Section 6 of the Federal Employers' Liability Act, so as to limit venue in actions brought thereunder. Thereafter, but in the same session, he introduced a substitute bill (H. R. 1639) less drastic in its provisions, but designed to accomplish the same general purpose. It provided that in certain eventualities, which need not be here considered, an action under the said Act could be brought only in the district or county in which the accident occurred, or in which the employee suffering injury or death resided at the time when the accident occurred.

At the opening of the hearings before the subcommittee of the Committee on the Judiciary of the House of Representatives, the sponsor of the bills asked that H. R. 242 be not considered, inasmuch as he was interested only in the passage of H. R. 1639. The hearings were quite extensive; and the record thereof consists in large part of the oral testimony of representatives of various Bar Associations and attorneys for several railroad companies, and copies of resolutions adopted by the Bar Associations of many of the states advocating the limitation of venue of actions commenced under the Federal Employers' Liability Act.

The general purport of the testimony and resolutions was to the effect there existed widespread solicitation of cases under the Act as well as other unethical practices, and that a comparatively small group of law firms, generally in the more populous states, represented employee plaintiffs in a substantial percentage of the cases brought thereunder. It was urged that the limitation of venue provided for in H. R. 1639 would eliminate or substantially reduce those evils. It was also urged by the proponents and supporters of the bill that the prosecution of these actions in large cities remote from the scene of the accidents has resulted in what were referred to as exorbitant verdicts for the employees. Opponents of the bill argued that if the first contention is correct, it would be more advisable and proper for the constituted authorities to institute disciplinary proceedings than to impose restrictions and limitations on the injured employee. As to the second contention, the bill's opponents criticised the standard which was employed to justify the opinion or conclusion that the verdicts were exorbitant. They urged, on the contrary, that the verdicts recovered in other jurisdictions provided entirely inadequate compensation for the injuries suffered by employees.

The Jennings bill was being considered by the Congress during the same period that it had the New Federal Judicial Code under advisement. The Jennings bill failed to pass the Congress. It seems fair to assume, therefore, that it was not the intent of the Congress to give such sweeping significance and import to Section 1404(a) of the New Federal Judicial Code as the defendant contends.

There are several additional facts and circumstances which in my judgment justify the opinion that it was not the intent of the Congress to apply Section 1404(a) of the New Federal Judicial Code to actions under the Federal Employers' Liability Act.

My distinguished colleague, District Judge Gaiston, a member of the Judicial Conference Committee on Revision of the Judicial Code, in his "Introduction to the New Federal Judicial Code," 8 Fed. Rules Decisions, 201, said:

> "As the title of the bill indicates, the object of the Congress was to revise and codify existing law. The temptation in so doing to incorporate new matter was at times very great; *but the rule of Exclusion stated in its broadest terms was to reject anything of a controversial nature.* In consequence the bill as it was introduced in the closing days of the second session of the 79th Congress expressed the efforts of the draftsmen to simplify, consolidate, rearrange, rephrase and indeed streamline former Title 28."

And then, further:

> "*The breadth of the survey of Titles other than Title 28 of the United States Code is indicated in the present act* in the schedule of laws repealed." (Emphasis added.)

Charles J. Zinn, Esq., Law Revision Counsel to the Committee on the Judiciary of the House of Representatives, in a statement made before the said Committee, said, inter alia (see pages 1980 and 1981 of the West Publishing Company's Publication—United States Code, Congressional Service—):

> "In the work of revision, principally codification, as we have done here, keeping revision to a minimum, I believe the rule of statutory construction is that a mere change of wording will not effect a change in meaning unless a clear intent to change the meaning is evidenced,"

and:

> "People who are afraid that we are changing the law to a great extent need not worry particularly about it."

At page 1945 of said publication Hon. Eugene J. Keogh, a member of the House of Representatives, and a former Chairman of the House Committee on the Revision of the Laws, said:

> "The policy that we adopted, which in my mind has been carefully followed by the revisers and by the staff of the publishing companies, was to avoid wherever possible the adoption in our revision of what might be described *as controversial substantive changes of law*." (Emphasis added.)

Many other statements to the same general effect, made by members of Congress and others, appear in the said

publication and in the Report of the Committee and the record of the hearings held before it.

The failure to make specific reference to Section 6 of the Federal Employers' Liability Act, or at least to include the said section in the aforementioned schedule or table of laws repealed, appears to confirm the opinion of this Court that it was not the intent of the Congress to make Section 1404(a) of the New Federal Judicial Code applicable thereto.

The said Section 1404(a), except to the extent that it applies to those venue provisions contained in Chapter 87, aforementioned, merely makes statutory the doctrine of "forum non conveniens." To make it applicable to actions under the Federal Employers' Liability Act would be to negative the aforementioned decisions of the Supreme Court, and I am unwilling to agree that that was the intent of the Congress.

Granting venue rights under Section 6 of the Federal Employers' Liability Act was a meaningful and purposeful exercise of legislative prerogative by Congress, and should be taken away only by an equally specific discharge of its legislative function. I do not think that Section 1404(a) of the new code accomplished that purpose. The 81st Congress is about to meet in session, and will have an opportunity to clarify the situation here involved.

Since it is the opinion of this Court that Section 1404 (a) is not applicable to actions brought under the Federal Employers' Liability Act, it becomes unnecessary to consider the question of convenience raised by the defendant.

Accordingly, the motion is denied. Settle order on notice.

Dated: November 19, 1948

LEO F. RAYFIEL,
U. S. D. J.

Supreme Court of the United States

BRIEF IN SUPPORT OF PETITION, SUPPLEMENTING SUMMARY CONTENTIONS IN ORIGINAL BRIEF DATED NOVEMBER 20, 1948

INDEX AND SUMMARY OF CONTENTIONS

B. The House of Representatives finally passed the Jennings Bill by a close margin of eight votes 10 days after it had passed the revision.

C. The heated debate on the Jennings Bill in the House just 10 days after the passage of the revision without any reference therein to Section 1404(a) demonstrates a total absence of Congressional intent to make Federal Employers' Liability Act cases transferable.

D. A contraction of employees' rights under the Federal Employers Liability Act would reverse long-term Congressional trends.

POINT V

The granting of invulnerable venue rights under Section 6 of the Federal Employers' Liability Act was a meaningful and purposeful exercise of legislative prerogative by Congress. It could only be taken away by an equally specific discharge of the legislative function. The Generalities in a revision do not accomplish that purpose. The District Judge lacked the power to make an order transferring this action out of the Southern District of New York and should be directed to nullify it

Table of Cases Cited

Other Authorities Cited

IN THE

Supreme Court of the United States

October Term, 1948

No. 233—Miscellaneous

Summary Docket

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION, SUPPLEMENTING SUMMARY CONTENTIONS IN ORIGINAL BRIEF DATED NOVEMBER 23, 1948

Statutes Involved

Section 6 of the Federal Employers' Liability Act (as amended in 1910—45 U. S. C. A. 56), in relevant part provides:

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of-

the courts of the several States; and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Section 1404(a) of the revised Judicial Code, effective September 1, 1948 (28 U. S. C. A. 1404(a)), provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been tried."

Issue Involved

The narrow issue involved on the merits is whether or not the revised Judicial Code (28 U. S. C. A. 1404(a)) empowers a District Judge to transfer an action brought under the Federal Employers' Liability Act (45 U. S. C. A. 51-56).

POINT I

It was completely settled prior to the enactment of the revised Judicial Code that the choice of venue under the Federal Employers' Liability Act was not subject to discretionary impairments by the courts.

The present special venue provision of the Federal Employers' Liability Act[1] was passed by an amendatory act of Congress on April 5, 1910 and gave an unqualified choice to an injured railroad worker to select as the venue for the prosecution of the remedy which the Act established for him, any district where the defendant was doing busi-

1 45 U. S. C. A. 56.

ness at the time of the commencement of the action. After 38 years of embittered litigation in both Federal and State courts, an interpretation of this special venue provision as being of the essence of that remedy and of the general humanitarian purposes thereof, was accomplished and became well settled.

The judicial awareness of the inviolability of this choice became so well crystallized that contemporary courts have spoken of the choice of venue afforded to the injured workman as a "substantive right".[2]

The minimal conclusion that may be drawn from the decisions of this Court is that the choice of venue given an injured railroad employee was purposeful and not subject to debilitation by the exercise of discretionary judicial powers.

Baltimore & Ohio R. Co. v. *Kepner* (1941), 314 U. S. 44;

Miles v. *Illinois Central R. R. Co.* (1942), 315 U. S. 698;

Gulf Oil Corporation v. *Gilbert* (1947), 330 U. S. 501, 503;

Kilpatrick and Parker v. *Texas & Pacific Railway Co.* (1948); 166 F. (2d) 788, cert. den. October 11, 1948.

In the *Kepner* case, *supra*, the Court was faced with what would be in ordinary litigation a vexatious and un-

2 *Akerly* v. *New York Central R. R. Co.*, C. A. 6th Circuit, 168 F. (2d) 812, 814 (1948).

Fleming v. *Husted* (1946), 68 F. Supp. 900, D. C., S. D. of Iowa.

Compare with *Sheridan* v. *Pere Marquette Ry.* (1945), 62 F. Supp. 590, in which the Court refers to the choice of venue as an "adjective right" (page 593) but adds: "The beneficial effects of the statute should not be whittled away by the courts by distinguishing between adjective and substantive rights", and states that adjective rights are frequently as important as substantive rights.

conscionable choice of venue, plus a power in the court below to exercise discretion. The Court said (page 51):

> "Under such circumstances, petitioner asserts power, abstractly speaking, in the Ohio Court to prevent a resident under its jurisdiction from doing inequity. Such power does exist."

This Court said further, however, that the grant of the venue privilege by Congress could only be diminished by Congress, as distinguished from the courts, and in the same manner as it had been previously established, *viz*: by the amendment to Section 6 of the Federal Employers' Liability Act of April 5, 1910.

From *Miles* v. *Illinois Central R. R. Co., supra,* we single out the lucid rationale of the considerations which may very well have motivated Congress in granting to the injured railroad employee such wide selectivity in choosing venue.[3]

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3 "Unless there is some hidden meaning in the language Congress has employed, the injured workman or his surviving dependents may choose from the entire territory served by the railroad any place in which to sue, and in which to choose either a federal or a state court of which to ask his remedy. There is nothing which requires a plaintiff to whom such a choice is given to exercise it in a self-denying or large-hearted manner. There is nothing to restrain use of that privilege, as all choices of tribunal are commonly used by all plaintiffs to get away from judges who are considered to be unsympathetic, and to get before those who are considered more favorable; to get away from juries thought to be small-minded in the matter of verdicts, and to get to those thought to be generous; to escape courts whose procedures are burdensome to the plaintiff, and to seek out courts whose procedures make the going easy.

That such a privilege puts a burden on interstate commerce may well be admitted, but Congress has the power to burden. The Federal Employers' Liability Act itself leaves interstate commerce under the burden of a medieval system of compensating the injured railroad worker or his survivors. He is not given a remedy, but only a lawsuit. It is well understood that in most cases he will be unable to pursue that except

We do not deem it material whether the Congress in 1910 adequately perceived the full extent of the utility to the injured railroadman of the choice of venue as discussed in Mr. Justice Jackson's separate concurring opinion. While his analysis is valuable for its realism and accuracy and its appraisal of the social desirability of permitting the broad choice of venue, its true importance here is that it furnishes a bill of particulars on the finding implicit in the majority opinions in *Kepner* and *Miles* that the grant of venue rights was a purposeful exercise of the legislative prerogative by Congress.

There is no distinction in legal contemplation between a judicial interference with the choice of venue based upon the ground that the choice of venue is generally unconscionable and inequitable, that it would constitute an undue burden on interstate commerce or upon the ground that it is violative of the doctrine of *forum non conveniens*.

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by splitting his speculative prospects with a lawyer. The functioning of this backward system of dealing with industrial accidents in interstate commerce burdens it with perhaps two dollars of judgment for every dollar that actually reaches those who have been damaged, and it leaves the burden of many injuries to be borne by them utterly uncompensated. Such being the major burden under which the workmen and the industry must function, I see no reason to believe that Congress could not have intended the relatively minor additional burden to interstate commerce from loading the dice a little in favor of the workman in the matter of venue.

"It seems more probable that Congress intended to give the disadvantaged workman some leverage in the choice of venue, than that it intended to leave him in a position where the railroad could force him to try one lawsuit at home to find out whether he would be allowed to try his principal lawsuit elsewhere. This latter would be a frequent result if we upheld the contention made in this case and in the *Kepner* case. I think, therefore, that the petitioner had a right to resort to the Missouri court under the circumstances of this case for her remedy."

JACKSON, J.

Miles v. *Illinois Central R. R. Co.*, 315 U. S. 698, 706.

That this Court is of like mind is apparent from the majority opinion in *Gulf Oil Corporation v. Gilbert*[4] and from the denial of certiorari to the Second Circuit in the *Kilpatrick* case, in which the Court of Appeals had said that any considerations of *forum non conveniens* were unconditionally eliminated from Section 6 (of the Federal Employers' Liability Act).[5]

Nor do we perceive any difference for the purpose of construing legislative intent in the light of the decisions of the Supreme Court, whether the mechanics of the impediments thrust at the choice of venue by a District Judge are dismissals or transfers. If in fact the choice of venue filled the entire field and cannot be frustrated for reasons of convenience or expense, it makes no difference whether the frustration is accomplished via a dismissal or transfer.

In 1948, at the time when Congress enacted the Judicial Code, there was a well established recognition in the courts that the grant of privilege of choosing venue in Federal Employers' Liability Act cases was purposefully benign toward the injured workman and not subject to impairment, impediment or disturbance by the exercise of conflicting inherent judicial powers.

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4 *Supra*, 505.

5 *Supra*, 790.

6 Of Section 1404(a) of the New Judicial Code (28 U. S. C. A. 1404(a)).

POINT II

The general purposes of the revision of the Judicial Code militate against a construction that Congress intended therein to empower District Judges to emasculate the right to choose venue, which it had previously conferred upon injured railroad men.

Section 1404(a) of the Judicial Code, by which the district judge believed he had been empowered to frustrate the venue selection made by the plaintiff below, became law as the result of the revision of the Judicial Code, and it is therefore pertinent to examine the nature of the enactment accomplishing that revision and its legislative history, with a view toward ascertaining if there be any feature thereof which would lend credence to the assumption of such a Congressional intent. We find nothing but evidence to the contrary.

Other than revision and codification, the major purpose of the enactment was to make Title 28 actual law rather than merely *prima facie* evidence thereof. The enactment itself is an act to "revise, codify and enact into law Title 28 of the United States Code".[7]

The general intendment of the revision was given detailed clarification in House Report 308 of the 80th Congress, First Session,[8] by which Congress was told:

> "Revision, as distinguished from codification, required the substitution of plain language for awkward terms, reconciliation of conflicting laws, repeal of superseded sections, and the consolidation of related provisions."

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7 Chapt 646, Public Law 773, approved June 25, 1948, effective September 1, 1948.

8 United States Code, Congressional Service, Title 28, page 1693.

Obviously, there was no necessity for a "revision" of the venue provision of the Federal Employers' Liability Act on that basis.

The report continues and discusses venue changes in such a manner as to clearly negate in the mind of a Congressman, had such question arisen, that there was an intention to make vulnerable the choice of venue as provided in the Federal Employers' Liability Act. The report stated:[9]

> "So also, minor changes were made in the provisions regulating the venue of district courts, in order to clarify ambiguities or to reconcile conflicts. These are reflected in the reviser's notes under Sections 1391 to 1406."

What Congress had authorized and believed it was passing upon was an expert revision and recodification;[10] the court below attributes to the panel of expert revisers hired for that purpose, an expropriation of authority clearly not given them to make changes in the highly controversial field of private rights between railroads and injured railroad employees.

The law enacting the revision was presented to both the House[11] and Senate[12] via the consent calendar; rules were suspended and the Bill passed practically without debate[12a]

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9 *Id.*, page 1697.

10 House Resolution 388, introduced October 5, 1939; "Revision of the Federal Judicial Code", Vol. 48 Law Notes p. 11; House Report 308, 80th Congress, 1st Session, United States Code Congressional Service, Title 28, p. 1695; Report of Attorney General Clark, *id.* p. 1699.

11 House Resolution 3214, passed July 7, 1947.

12 Passed on June 12, 1948.

12a The sole controversy centered about Tax Court provisions which were thereupon eliminated from the revision.

and without opposition. The reported comment of Congressmen indicate an intention not to legislate in any controversial fields. Senator Donnell, in presenting the Bill to the Senate, said:[13]

> "The purpose of this bill is primarily to revise and codify and to enact into positive law, with such corrections as were deemed by the Committee to be of substantial (sic) and non-controversial nature."

The counsel for the House Committee on the Revision of the Laws, Charles J. Zinn, Esq., testified before the Sub-Committee of the House Judicial Committee on March 7, 1947. He said:[14]

> "People who are afraid that we are changing the law to a great extent need not worry particularly about it."

Congressman Keogh, Chairman of the Committee originally in charge of the Bill, said at that time:[15]

> "The policy that we adopted, which in my mind has been very carefully followed by the revisers and by the staffs of the publishing company as well as the employees of the Committee, was to avoid wherever possible and whenever possible the adoption in our revision of what might be described as controversial substantive changes of law.[16] * * * We proceeded upon

13 United States Code Congressional Service, Title 28, p. 2020.

14 *Id.*, page 1981.

15 *Id.*, page 1945.

16 *Id.*, page 1950.

> the hypothesis that since that was primarily a restatement of existing law, we should not endanger its accomplishment by the inclusion in the work of any highly controversial changes in law."[17]

The Senate Report emphasized the non-controversiality of the revision. It said:[18]

> "Many non-controversial improvements have been affected * * *. At the same time, great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval."

In spite of the general nature of the legislation and in disregard of the limitations on the responsibilities and even the authority of the expert revisers, and oblivious to the record representations to Congress that the changes in the Code were non-controversial, it is nevertheless asserted that a Congressional intent to affect Federal Employers' Liability Act cases can be spelled from the fact that appended to the proposed legislation, which itself consisted of some 2,681 sections, there were revisers' notes and that in the revisers' note to Section 1404(a), a Federal Employers' Liability Act case is referred to as an illustration of the need for such a provision.

In the Congressional Service pamphlet, to which footnote references have been made herein, the Reviser's Notes themselves occupy some 236 printed pages as compared with the 152 pages of the actual Code.

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17 *Id.*, page 1950.

18 Senate Report 1559, 80th Congress, *id.*, page 1676.

The fallaciousness of extracting a Congressional intent from *such* revisers' notes is underscored by the comment of Congressman Robsion, the Chairman of the Committee, when he testified at the hearing on the legislation conducted by Sub-Committee 1 of the House Judiciary Committee on the Revision:[19]

> "You can never reach a time when the members of Congress will read a bill like that and then turn to all the hundreds and hundreds of references, the various statutes, to see whether they are correct or have been repealed, and perhaps we will not get many of them to read H. R 2055[20] which contains over 170 pages."

Congressman Devitt, a member of the Committee testifying at the same hearing, said:[21]

> "I emphasize the professional standing and ability of the authors of this work because I know it is not humanly possible for the members to read every word or even every section of the bill and that of necessity great reliance must be placed upon the integrity and caliber of the persons who did the work."

If Congressmen in passing on an expert revision of this character are not expected to read carefully the actual enactment of length 152 pages, is it not a *reductio ad absurdem* to charge them with having read the 236 pages of revisers' notes which accompanied the legislation?

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19 *Id.*, page 1941.

20 Supplanted by H. R. 3214.

21 United States Code Congressional Service, Title 28, page 1942.

Even if there be a grant that this revisers' note should be singled out for judicial examination the note must, if it is to be ascribed even the least importance, contain a clear and unambiguous statement of the intention of the revisers. But the revisers' note does not state that Section 1404(a) applies to Federal Employers' Liability Act cases. The reference to the *Kepner* case in the revisers' note is capable of an entirely different construction; a construction far more consistent with what one would anticipate the intendment of the revisers to be in their character as a group of expert draftsmen, to wit:

In Chapter 87 of the revision, of which Section 1404(a) is a part, the revisers had compiled numerous venue provisions, all except that in Section 1391 being of the "special" variety. Mr. Justice Frankfurter had pointed out in his dissent to *Kepner*[22] that there is nothing to distinguish literally a special venue provision from a general venue provision. Two judges of this Court had concurred with that dissenting view. Having redrafted these numerous "special" venue provisions the revisers may have feared that, without more, it was within the realm of possibility for the courts on the authority of the *Kepner* precedent to construe each enactment as having filled the entire field of venue in whatever particular classification of litigation was involved, and that the courts had thereby been deprived of their inherent equitable powers to invoke the doctrine of *forum non conveniens* or apply other inherent equitable powers to the venue choice. The revisers therefore may have believed as draftsmen that there was the need, if the doctrine of *forum non conveniens* was to be preserved, to incorporate in Chapter 87, along with the numerous "special" venue provisions, the "saving" pro-

22 314 U. S. 44, 62.

vision that in those cases the doctrine of *forum non conveniens* could be applied and the cases transferred.[23]

It is the far more credible and consistent view that the revisers, in selecting *Baltimore & Ohio* v. *Kepner* as the illustration of the need for such a provision, were thinking in terms of draftsmanship rather than the equities between railroads and their injured employees.

We submit that the ambiguity of the revisers' note is sufficiently patent, particularly when considered in the context in which it was presented to Congress, to bar the assertion that it represents any evidence of an intention to render illusory the right to choose venue in Federal Employers' Liability Act cases. The evidence afforded by the reports to the House and Senate, as well as the general purpose of the statute itself, strongly suggest that there was no Congressional intent to disturb those fields of litigation where, in the delicate adjustments of rights and liabilities, the choice of venue represented a valuable and pivotal point of balance.

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23 The history of the revisers' note bears out this thesis since it was prepared prior to October 30, 1945 and has been unchanged ever since the preliminary draft of the revision was originally sent to the Sub-Committee of the House by the Committee's counsel, Mr. Zinn, under date of October 30, 1945. The Court will recall, of course, that *Gulf Oil Corporation* v. *Gilbert*, *supra*, was not decided until 1947.

POINT III

By the use of the words "any civil action" in Section 1404(a) there was intended any civil action referred to in Chapter 87 of Title 28.

Chapter 87 of the revised Judicial Code is entitled: "District Courts; Venue". In this chapter, following the general venue provision,[24] there are assembled special venue provisions covering "banking association actions against the Controller of currency",[25] "proceedings to recover fines, penalties or forfeitures",[26] "recovery of Internal Revenue taxes",[27] "interpleader",[28] "enforcement of Interstate Commerce Commission orders",[29] "partition actions involving the United States",[30] "patents and copyrights",[31] "stockholders derivative actions",[32] "Federal Tort Claims Act cases",[33] and "condemnation proceedings".[34]

The combination of words "any civil action", by actual count, appear in Chapter 87 prior to its use in Section 1404(a), on 13 occasions. Where used in Chapter 87 prior to its use in Section 1404(a) it is modified. As illustrations: "any civil action by a national banking association" (1394), "any civil action for the collection of Internal Revenue taxes" (1396), "any civil action of interpleader" (1397), "any civil action for patent infringement" (1400); etc.

24 28 U. S. C. A. 1391.
25 *Id.*, 1394.
26 *Id.*, 1395.
27 *Id.*, 1396.
28 *Id.*, 1397.
29 *Id.*, 1398.
30 *Id.*, 1399.
31 *Id.*, 1400.
32 *Id.*, 1401.
33 *Id.*, 1402.
34 *Id.*, 1403.

etc. Section 1404(a), however, simply reads that a district court may transfer "any civil action" without modification.

Under these circumstances, it is imprudent to ascribe extraordinary significance to the use of the words "any civil action". The use of the words "any civil action" in the context found here is at best ambiguous and unclear. The ambiguity is resolved by the application of elementary presumptions of statutory construction.

Although the term "any civil action" is, of course, broad enough to include Federal Employers' Liability Act cases, it is to be construed as having no application or effect upon a special enactment. The special enactment is deemed to be an exception to the general provision.

> "Where there are two statutes, upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal or an absolute incompatability, that the special is intended to remain in force as an exception to the general. (*Townsend* v. *Little*, 109 U. S. 504, 512; *Ex Parte Crow Dog*, *id.* 556, 570; *Rogers* v. *Texas*, 185 U. S. 83, 87-89.)"[35]

We submit that the venue provisions which are reenacted in Chapter 87 are all of the civil actions in which the Court is empowered to apply the doctrine of *forum non conveniens*. We believe that the few omissions were purposeful. Beside the Federal Employers' Liability Act, the venue provision under the Anti-Trust Laws is excluded. There is no re-enactment of the venue provision of the Bankruptcy Law, but in that law itself there is contained a provision for transfer of proceedings on the ground of *forum non conveniens*.[36]

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35. *Washington* v. *Miller*, 235 U. S. 422, 428 (1914).

36. 11 U. S. C. A. 518.

POINT IV

The District Judge ignored the known temper of Legislative Opinion and Congressional action on the Jennings Bill underscored the absence of Congressional intent to affect venue under the Federal Employers' Liability Act by enacting the revision of the Judicial Code.

> "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes, or in the known temper of legislative opinion."[36a]

While there may be an area for disagreement in the minds of reasonable men as to the ultimate conclusions which may be drawn from the fact that the Jennings Bill,[37] which sought to restrict the choice of venue in Federal Employers' Liability Act cases, passed the House in the 80th Congress but did not reach the floor in the Senate, the record debate and literature on this proposal demonstrably establish that the subject matter was provocative of a vast plethora of divergent and mutually exclusive views.[38]

36a Some Reflections on the Reading of Statutes by Mr. Justice Frankfurter (Cardozo lecture of March 18, 1947), Vol. 2 The Record of the Association of the Bar of the City of New York, p. 229.

37 H. R. 1639; 80th Congress.
H. R. 242 and H. R. 6345; 79th Congress.

38 See testimony before Subcommittee #4 of the House Committee on the Judiciary on H. R. 1639 given on March 28, April 1, 14 and 18, 1947 (compare testimony of J. Carter Fort, Vice Pres. and General Counsel of the Association of American Railroads, and John W. Freels, General Attorney of the Illinois Central Railroad, on the one hand, with Harry See, National legislative representative of the Brotherhood of Railroad Trainmen, Warren H. Atherton, Esq., special counsel, Brotherhood of Railroad Trainmen, A. E. Lyon, Executive Secretary, Railway Labor Executives Assn., Jonas A. McBride, Vice President and national legis

The House of Representatives just did barely pass[39] the Jennings Bill on July 17, 1947 *ten days after it had passed the revision containing Section 1404(a) without debate;* the debate on the floor of the House on the Jennings Bill consumes some 15 pages of the Congressional Record[40] but not one word was said to indicate that the

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lative representative, Brotherhood of Locomotive Firemen & Enginemen, and W. D. Johnson, vice president and national legislative representative, Order of Railway Conductors of America, on the other; Some 16 labor groups expressed opposition. 37 Bar Associations expressed views but *not* on the form in which the House passed the bill; as indicated there were three bills in the House and H. R. 1639 was amended before passage; at least 3 articles appeared in the American Bar Association Journal alone, viz: *Bill to Curb "Shopping" for Forums Is Urged,* Gay 33 A. B. A. J. 659; *Substitute for Jennings Bill Is Urged,* Devitt 34 A. B. A. J. 454; *Statement* by Frederick W. Brune, 34 A. B. A. J. 457 (June 1948). Oddly, Mr. Devitt urged that since "H. R. 1639 would patently discriminate against the Rail Worker, a substitute which would effectuate the operation of the doctrine of *Forum Non Conveniens* should be considered." Mr. Brune, who as chairman of the American Bar Association's Committee on Jurisprudence and Law Reform wrote in defense of H. R. 1639 as passed, said: "Perhaps the strongest objection to placing the matter of venue in FELA cases in exactly the same position as venue in ordinary civil cases is the one pointed out by Mr. Justice Jackson in his concurring opinion in *Miles* v. *Illinois Central R. Co.,* 315 U. S. 698, where he spoke of the possibility that an injured railroad worker might be forced to 'try one lawsuit at home to find out whether he would be allowed to try his principal lawsuit elsewhere'. A similar possibility would exist in any case in which a motion to dismiss on the ground of *forum non conveniens* had to be fought out as a preliminary to a trial on the merits."

39 The Roll Call vote was

Yeas	—	203
Nays	—	188
Present	—	1
Not Voting	—	38

93 Cong. Rec. 9193.

40 93 Cong. Record 9178-9193. During the debate the "Devitt Amendment" proposing that choice of venue in FELA cases be made subject to the doctrine of "Forum Non Conveniens" was argued on the floor of the House and defeated.
The railroads and bar associations urged restrictions in venue choice to prevent "abuses" by a small group of the bar. The testimony before

House had just ten days prior thereto passed the revision containing Section 1404(a).

Two observations are manifestly irrebutable:

1. When Congress passed the revision in reliance on the representations that what changes there were in the venue provisions of the Judicial Code, were of a "minor" and "non-controversial" nature, it could not have had in mind the venue provisions of the Federal Employers' Liability Act.

2. If Congress had actually intended to affect the venue provision of the Federal Employers' Liability Act in the Judicial Code, at least one Congressman could have been expected to observe that the lengthy and stormy debate on the Jennings Bill was unnecessary in view of the passage of the revision ten days earlier.

While the Senate failed to pass the Jennings Bill and did pass the Revision, it is the record in the House, paradoxically, which more clearly establishes the legislative intent not to affect Federal Employers' Liability Act venue by Section 1404(a).

When viewed in broad perspective, there is an implicit finding in the decision of the District Judge of a Congressional intent to reverse the entire current of legislative enactment and judicial interpretation thereof by the Supreme Court. For 41 years, without a single backward step, what legislative changes there have been in the Fed-

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the Subcommittee disclosed however that during the 5 years 1941-45 when there were a total of 211,057 casualties including 4943 deaths, the number of cases alleged by the railroads to reflect objectionable practices was 2500. The instant litigation was cited by the railroads as objectionable because of the distance involved in the choice of venue (House hearings on H. R. 1639, pp. 119, 121).

eral Employers' Liability Act have each tended to liberalize the rights and remedies of the injured workman.[41]

Congress had consistently manifested in the past a recognition of the burdens, obstacles and disadvantages which have beset the injured railroad worker in his efforts to obtain his one dollar out of every two dollars of judgment under the "backward system" of compensating for industrial accidents in this exceedingly hazardous occupation. The modern and liberal trend of legislative enactments by Congress were at least limited responses to the perception that the railroad and the injured worker do not come before the judicial tribunal with equal opportunity.[42] The development of the Federal Employers' Liability Act was contemporary with the enactment by practically every State in the Union of Workmen's Compensation Laws, which imposed liability without fault on employers.

There was a total absence of *indicia* that Congress intended a reversal of its long and well established benevolent policy toward injured railroad workers. Such intent cannot be lightly presumed, as was manifestly done by the District Judge.

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41 Amendment to Section 51 of August 11, 1939, Chapter 685, Section 1, 53 Stat. 1404, broadened the definition of an employee.

Amendment to Section 54 of August 11, 1939, C. 685, Section 1, 53 Stat. 1404, eliminated assumption of risk as a defense to actions based on negligence.

The Statute of Limitations, as set forth in Section 56, was changed from 2 to 3 years by the Act of August 11, 1939, Paragraph 2 thereof.

Section 60 was added on the same date, establishing a penalty for suppression of information relating to industrial accidents by the carriers.

42 The injured employee has the burden of proving negligence and of producing evidence, frequently unobtainable and in the hands of the railroads who own and control the premises and equipment involved. The witnesses are under the control and general supervision of the railroad in most instances. The railroad is enabled to make an early and thorough investigation of the occurrence, etc.

POINT V

The granting of invulnerable venue rights under Section 6 of the Federal Employers' Liability Act was a meaningful and purposeful exercise of legislative prerogative by Congress. It could only be taken away by an equally specific discharge of the legislative function. The generalities in a revision do not accomplish that purpose. The District Judge lacked the power to make an order transferring this action out of the Southern District of New York and should be directed to nullify it.

Dated: January 13, 1949.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 233 Miscellaneous

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

Ex Parte JESSIE A. KILPATRICK,

Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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December 3, 1948.

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Statement

By his motion for leave to file a petition for a writ of mandamus directed to the Honorable John C. Knox, United States District Judge for the Southern District of New York, or a petition for a writ of certiorari to the United States District Court for the Southern District of New York, petitioner seeks to have this Court review an order of the United States District Court for the Southern District of New York entered on November 22, 1948. This

order (Appendix to Petition, pp. iii-iv) denied the petitioner's motion for a trial preference in an action brought under the provisions of the Federal Employers' Liability Act (45 U. S. C. A. §§51-60), and granted, in the exercise of the Court's judicial discretion, the respondent's cross-motion to transfer the trial of this action to the United States District Court for the Northern District of Texas, Fort Worth Division. The petitioner's complaint states that he is a resident of nearby Big Spring, Texas, where the accident occurred which gave rise to this action to recover damages in the sum of $300,000.

The petitioner seeks to invoke this Court's jurisdiction directly. He has neither appealed this order to the Court of Appeals for the Second Circuit, nor petitioned that Court for a writ of mandamus directed to Judge Knox.

Grounds of Respondent's Opposition to the Motion

Respondent opposes this motion on the following grounds:

1. The petitioner's contentions with respect to the exclusion of Federal Employers' Liability Act cases from the scope of §1404(a) of Title 28, United States Code, are clearly lacking in merit.

2. Petitioner has made no prior application for the same relief to the Court of Appeals for the Second Circuit.

3. There is no element of such vital public importance as to warrant this Court in exercising its discretion in petitioner's favor.

4. This Court lacks jurisdiction to grant the relief requested, for clearly the most that the petition shows

is error in the exercise of conceded judicial power, not usurpation of judicial power by the District Court.

5. The power of this Court is sought to be invoked, not in aid of its appellate jurisdiction, but only as a substitute for an appeal not permitted by statute.

ARGUMENT

POINT I

The petitioner's contentions with respect to the exclusion of Federal Employers' Liability Act cases from the scope of Section 1404(a) of Title 28, United States Code, are clearly lacking in merit.

It is doubtful, to say the least, whether the Court has jurisdiction to pass upon this motion (*infra* pp. 10-13). However, respondent turns first to the question whether §1404(a) of Title 28, United States Code, embraces an action brought under the provisions of the Federal Employers' Liability Act (45 U. S. C. §§51-60).

For the purposes of this motion, and in the interest of brevity, respondent will stand upon the scholarly and lucid opinions by Judge Kaufman in *Nunn* v. *Chicago, Milwaukee, St. Paul and Pacific R. Co.* (S. D. N. Y., November 9, 1948, Appendix to Petition pp. vi-xiv), and by Judges Nordbye and Joyce in *Hayes* v. *Chicago Rock Island and Pacific R. Co.*, 79 F. Supp. 821 (D. C. Minn. September 25, 1948), relied upon by Judge Knox in the instant case.

Respondent presented to Judge Knox on the argument of this motion below certain legislative source material concerning §1404(a), not called to the attention of either Judges Nordbye, Joyce, Kaufman or Rayfiel, which clearly shows the intention of Congress that the statutory phrase

"any civil action" includes a civil action brought under the Federal Employers' Liability Act.

Appended to the report on the revised code submitted by the Committee on the Judiciary of the House of Representatives (H. Rept. No. 308, 80th Cong. 1st Session, April 25, 1947) were the reviser's notes to each section together with accompanying tables. "These [notes] explain in great detail the source of the law and the changes made in the course of the codification." S. Rept. No. 1559, 80th Cong., 2d Session, June 9, 1948, p. 2. The reviser's note to Section 1404(a) states that the section was drafted "in accordance with the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper." "As an example of the need of such a provision," the reviser specifically cited *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, "which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio."

The reference to this Court's opinion in the *Kepner* case is not accidental. In fact, the history of the reviser's note conclusively shows that §1404(a) was designed to give a district court the discretion to transfer in precisely the situation presented in that case.

The Second Draft of the Code, together with the reviser's notes thereto, was circulated by the reviser during the spring of 1945 to the Advisory Committee, the Judicial Conference Committee, the Judicial Consultant, Judge Parker, and the Special Consultants, Judge Holtzoff and Professor James W. Moore, as well as to every member of the legislature and the Federal judiciary. The members of the committees, together with the consultants and the revision staff, met at Hershey, Pennsylvania for three days at the end of May, 1945 to consider this draft "section by section," to discuss "all the questions which had arisen in

the course of their preparation," and to reach decisions "for the guidance of the staff in the further revision of the drafts." In addition to eminent advisory committees, "Prof. James W. Moore, author of Moore's Federal Practice and Chairman Eugene J. Keogh of the House Committee on Revision of the Laws made important contributions to the discussions. Our committee can attest to the extremely thorough and full consideration which was given by this advisory group to every doubtful point which arose in the court [sic] of the work." (Statement of Hon. Albert B. Maris, United States Circuit Judge for the Third Circuit, at hearing before Subcommittee No. 1 of the House Judiciary Committee, March 7, 1947, 28 United States Code Congressional Service, p. 1958.)

The language of Section 1404(a) in this Second Draft was similar to that finally enacted by Congress, but the reviser's note was somewhat different. It read then as follows:

> "Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper. The author gave as an example for the need of such a provision *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

Professor Moore has kindly furnished counsel with a copy of the memorandum referred to, in which he wrote to the reviser with reference to the doctrine of *forum non conveniens*:

> "Improper venue results in the dismissal of an action in the federal courts if the point is timely made. I think this result can no longer be justified in this era of easy communication and travel. Provision should be made for transfer when an objection of improper venue is sustained, probably with the imposition of costs and possibly a reasonable attorney's fee. Then I believe we should go further and give some recognition to the doctrine of *forum non conveniens* and permit a court to transfer the case, even though the venue is proper, to a more convenient forum. In my opinion the District Court for the Eastern District of New York should have had the power in the situation presented in the *Kepner* case, 314 U. S. 44, 62 S. Ct. 6, to transfer the action under the Federal Employer's Liability Act to a federal court in Ohio where the accident occurred and the employee resided and which would have been a proper venue."

In Volume 3, *Moore's Federal Practice* (*Second Edition*), published December, 1948, there is an extensive discussion of §1404(a) which the author concludes as follows (§19.04, p. 2141):

> "The Judicial Code Revision did not change the underlying basic principles of venue. It did, however, make some substantial changes and certainly put venue on a more workable basis. It adopts the principle of forum non conveniens, but provides for a transfer, not dismissal, of *any* action to a proper and more convenient forum."

In a footnote to this text, Professor Moore states (p. 2141, note 107):

> "*Any* action in §1404(a) includes suits subject to special venue statutes, as suits for patent infringement and suits under the Federal Employers' Liability Act, as well as actions subject to the general venue statute."

This explanation of the reference to the *Kepner* case in the reviser's note, together with the fact that the clear and unambiguous language of §1404(a) stood untouched throughout three years' consideration of the code revision by Congressional groups and expert advisory committees, is indicative of the legislative intent that this new statute should include within its scope civil actions brought in the district courts under the Federal Employers' Liability Act (*United States* v. *National City Lines, Inc.*, 334 U. S. 573, 596-7).

POINT II

Petitioner has made no prior application for the same relief to the Court of Appeals for the Second Circuit.

Conceding merely for purposes of argument that this Court would have jurisdiction under §1651(a) of Title 28, United States Code, to grant this motion for leave to file a petition for a writ of mandamus or certiorari, petitioner's motion, made prior to any application in the Court of Appeals for the Second Circuit, should be denied. The correct rule is stated in *Ex Parte Peru*, 318 U. S. 578 (at p. 584):

> "And ever since the statute vested in the circuit courts of appeals appellate jurisdiction on direct appeal from

the district courts, this Court, in the exercise of its discretion, has in appropriate circumstances declined to issue the writ to a district court, but without prejudice to an application to the circuit court of appeals (*Ex parte Apex Mfg. Co.*, 274 U. S. 725; *Ex parte Daugherty*, 282 U. S. 809; *Ex parte Krentler-Arnold Hinge Last Co.*, 286 U. S. 533), which likewise has power under §262 of the Judicial Code to issue the writ. *McClellan* v. *Carland*, 217 U. S. 268; *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269."

While it is true that in the *Peru* case this Court entertained a motion for leave to file a petition for a writ prior to application in the Court of Appeals, the late Chief Justice Stone made it clear that it was only the public importance and exceptional character of that claim of sovereign immunity which called for the exercise of the Court's discretion to issue the writ, rather than to relegate a friendly sovereign power the court of appeals. There, the clash between the executive branch of the government which had certified sovereign immunity, and the judicial branch which had refused to recognize the certification, required action by this Court. Obviously, no such extraordinary circumstances are presented here.

In *United States Alkali Export Association, Inc.* v. *United States*, 325 U. S. 196 and *De Beers Consolidated Mines Ltd.* v. *United States*, 325 U. S. 212, suits in equity by the United States under §4 of the Sherman Act (15 U. S. C. §4), this Court entertained petitions for writs of certiorari to the district court in the first instance because sole appellate jurisdiction lay in this Court under §29 of the Act (15 U. S. C. §29). Therefore, it was said in the *Alkali Export Association* case that "application for a common law writ in aid of appellate jurisdiction must be

to this Court" (*supra*, p. 202). The late Chief Justice Stone, however, reaffirmed the rule of *Ex Parte Peru*, as applicable to all cases of which this Court does not have *sole* appellate jurisdiction (*ibid.*):

> "In the usual case this Court will decline to issue a writ prior to review in the Circuit Court of Appeals, whether by ordinary appeal, *In re Tampa Suburban R. Co.*, 168 U. S. 583, 588, or by an extraordinary remedy, see *Ex parte Peru, supra*, 584."

POINT III

There is no element of such vital importance as to warrant this Court in exercising its discretion in petitioner's favor.

Again assuming this Court's jurisdiction, the petitioner's motion for leave to file a petition for a common law writ directed to the Honorable John C. Knox, United States District Judge for the Southern District of New York, should be denied upon the ground that the petitioner does not show that he is entitled to the relief requested.

Obviously, the only effect of this order of transfer is that the petitioner will present his cause of action for damages to a federal court and jury in Fort Worth, Texas, rather than to a court and jury in New York City. It is hard to see how the petitioner will be prejudiced in any legal sense by this transfer; in fact, he may be able to subpoena necessary witnesses for a trial in Fort Worth, Texas, whose presence he could not secure at a trial in New York City. In any event, the petitioner's motion does not present "a really extraordinary cause" which would entitle him to the drastic and extraordinary remedy sought herein (*Ex Parte Fahey*, 332 U. S. 258, 260).

POINT IV

This Court lacks jurisdiction to grant the relief requested, for clearly the most that the petition shows is error in the exercise of conceded judicial power, not usurpation of judicial power by the District Court.

The petitioner must base his application for the drastic and extraordinary remedy sought by this Petition upon the assertion that the order of transfer entered in the District Court was "beyond the power of the District Judge" (Petition, p. 6), his contention being "that the court has no judicial power to do what it has done and that its action was not merely error but a usurpation of power."

However, the petitioner also argues that §1404(a) of Title 28, United States Code, effective September 1, 1948, giving discretion to a district court to transfer "any civil action," for the convenience of parties and witnesses, and in the interest of justice, to any other district where it might have been brought, has no application whatsoever to a civil action brought under the Federal Employers' Liability Act (Brief pp. 14-15). Thus, the legal principles excluding the application of the doctrine of *"forum non conveniens"* to such cases are said not to have been altered in any way by the new statute. Yet, prior to September 1, 1948, the effective date of the new statute, it must be conceded that Judge Knox would have had the *judicial power* to dismiss this action on the ground of *forum non conveniens*, even though his decision would have been erroneous (*Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 505, and cases cited therein). Therefore, it is quite obvious that the petitioner's complaint is not connected with usurpation of judicial power by the District Court, but merely with an alleged misconstruction of the statute in the exercise of conceded judicial power.

Accordingly, this Court lacks jurisdiction, and the extraordinary relief requested should be denied upon this ground alone (*Ex Parte Chicago R. I. & Pac. Ry. Co.*, 255 U. S. 273, 279-80; *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 26-32; *United States Alkali Export Association, Inc.* v. *United States*, 325 U. S. 196, 202).

POINT V

The power of this Court is sought to be invoked, not in aid of its appellate jurisdiction, but only as a substitute for an appeal not permitted by statute.

Section 1651(a) of Title 28, United States Code states that this Court and all courts established by Act of Congress may issue all writs:

> "* * * *necessary or appropriate in aid of their respective jurisdictions* agreeable to the usages and principles of law."

The statutory authority of this Court to issue writs of mandamus or certiorari to district courts can be constitutionally exercised only in so far as such writs are in aid of its appellate jurisdiction. (*Ex Parte Peru*, 318 U. S. 578, 582.) This Court also has power to issue the writ, even though direct appellate jurisdiction is vested in the court of appeals, if this Court has ultimate discretionary jurisdiction by certiorari (*Ex Parte Peru, supra*, at pp. 584-5).

These rules do not cover the exercise of this Court's jurisdiction in the instant case, for the Court of Appeals for the Second Circuit is not vested by statute with direct appellate jurisdiction over this order of transfer. Therefore, this Court has no power to act in aid of an appellate jurisdiction that likewise could not exist.

The order entered herein by the district court merely transfers the trial of this action to Texas. The order is

not final in any respect, as regards the merits of the case. In petitioner's view, the "matter involved lies outside the issues of the case" (Petition, p. 5). We believe that the Court of Appeals for the Second Circuit would be without appellate jurisdiction, since it may only review, with exceptions not here material, "appeals from all final decisions" of the district courts, except where a direct review may be had in this Court (28 U. S. C. §1291; cf. *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 29-30).

The non-appealability of this type of transfer order was recognized recently by this Court in *United States* v. *National City Lines, Inc.*, 334 U. S. 573. Commenting upon a previous order of transfer which had been entered upon defendants' motion in a companion criminal anti-trust suit, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, Mr. Justice Rutledge said (at p. 594):

> "Moreover, it is at least doubtful whether the Government had a right to appeal from the order of transfer in the criminal case.[43]"

Consequently, the petitioner is merely attempting to prevail upon this Court to "substitute mandamus for an appeal contrary to the statutes and the policy of Congress." *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 32. As the late Chief Justice Stone wrote for a unanimous Court in the *Roche* case (p. 30):

> "Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Con-

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"43 The precise point apparently has not arisen since the adoption of Rule 21(b), but there would seem to be no statutory basis for an appeal from an order of this type. See 18 U. S. C. A. §682. See also *Semel* v. *United States*, 158 F. (2d) 231, 232."

gressional policy against piecemeal appeals in criminal cases. *Cobbledick* v. *United States*, 309 U. S. 323. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review. 'The effect therefore of this mode of interposition would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times before there could be a final judgment.' *Bank of Columbia* v. *Sweeney*, 1 Pet. 567, 569. See also *Life & Fire Insurance Co.* v. *Adams*, 9 Pet. 573, 602; *Ex parte Hoard*, 105 U. S. 578, 579-80; *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379."

CONCLUSION

The petitioner's motion for leave to file a petition for a writ of mandamus to the Honorable John C. Knox, United States District Judge for the Southern District of New York, should be denied; the alternative motion for leave to file a petition for a writ of certiorari to the United States District Court for the Southern District of New York should be denied.

Dated: New York, N. Y., December 3, 1948.

Respectfully submitted,

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WILLIAM H. TIMBERS
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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

JESSIE A. KILPATRICK,
Petitioner,

against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

Ex parte JESSIE A. KILPATRICK,
Petitioner.

No. 233
Miscellaneous.
Summary
Docket.

RESPONDENT'S SUPPLEMENTAL BRIEF

This case now stands for argument under the following order of this Court entered December 20, 1948:

> "This case is assigned for hearing on the motion for leave to file petition for a writ of mandamus or certiorari and the case is transferred to the summary docket."

This brief for respondent supplements our opposing brief dated December 3, 1948, and is in answer to the brief of petitioner dated January 13, 1949.

History and Status of Litigation

Petitioner Kilpatrick, a yard employee of respondent The Texas and Pacific Railway Company, was involved in a serious accident on November 20, 1946, at Big Spring,

exas. As the result he lost both legs. Petitioner at the me was a resident of Big Spring. The eyewitnesses to accident, the physicians who treated the petitioner, and early all the other witnesses for both sides, reside in Big pring. The respondent Railway Company is a citizen of exas* and has its main offices there. Its railroad lines e located only in Texas, Arkansas and Louisiana.

In December 1946 petitioner filed suit under the Fedral Employers' Liability Act in the United States District ourt for the Southern District of New York, where reondent maintains an office for the purpose of soliciting assenger and freight traffic.

On motion of respondent, the New York action was smissed on July 16, 1947, by order of Judge Caffey (72 Supp. 635) on the ground that respondent was not "doing usiness" in the Southern District of New York and could ot be served there.

On September 3, 1947, petitioner appealed to the Court Appeals for the Second Circuit from Judge Caffey's smissal of his New York action.

A few days later, on September 12, 1947, petitioner ommenced an identical action in the United States Disict Court for the Northern District of Texas, in which ig Spring is located. Respondent promptly answered in e Texas action; and during December 1947 a number depositions for use in the Texas action were taken by

*The Texas and Pacific Railway Company was incorporated Act of Congress in 1871. Its charter, as amended February 9, 23 (C. 66, Laws of 1923, 42 Stat. 1223) provides:

> "That the Texas and Pacific Railway Company, for the purposes of all actions at law by or against it, real, personal, or mixed, and all suits in equity, shall be deemed a citizen of the State of Texas and an inhabitant of the County of Dallas, in said State: * * *."

both sides (eight witnesses for the plaintiff and three for the defendant).

On March 4, 1948, the Court of Appeals for the Second Circuit handed down its opinion (166 F. (2d) 788) reversing Judge Caffey and holding that the respondent Railway Company was "doing business" in New York and was subject to service there.

Immediately following that opinion, petitioner moved to dismiss his action in Texas. When the District Court refused to dismiss, petitioner appealed to the Court of Appeals for the Fifth Circuit and also applied to that Court for a writ of prohibition. His application for a writ of prohibition was denied by the Fifth Circuit on April 13, 1948 (*In re Kilpatrick*, 167 F. (2d) 471).

On September 9, 1948, petitioner filed in this Court a petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit and for a writ of prohibition to the District Court for the Northern District of Texas (No. 275, Miscellaneous No. 119). That application is still undetermined.

On September 24, 1948, petitioner applied to Mr. Justice Black for a stay of trial in the Texas action. By arrangement with counsel, no formal stay was issued, but further proceedings in Texas have been held in abeyance to await the ruling of this Court.

On October 11, 1948, this Court denied the respondent Railway's petition for certiorari (No. 72) to review the decision of the Second Circuit on the question whether respondent is "doing business" in New York.

On October 27, 1948, petitioner moved in the Southern District of New York for a preference in the trial of his New York action. Respondent made a cross-motion, pur-

suant to Section 1404(a) of the newly enacted Judicial Code [28 U. S. C. A. 1404(a)], for an order transferring the New York action to the United States District Court for the Northern District of Texas.

On November 12 and 17, 1948, Judge Knox filed two memorandum opinions (appearing at pp. i and ii of the Appendix to petitioner's motion papers here) denying petitioner's motion for preference and granting respondent's cross-motion for a transfer of the action to Texas. He followed these memorandum opinions with an order of transfer dated November 22, 1948 (p. iii of Appendix to petitioner's motion papers here).

On November 24, 1948, petitioner filed in this Court a motion for leave to file a petition for writ of mandamus or certiorari to direct Judge Knox

> "to nullify his order of November 22, 1948, transferring this cause out of the Southern District of New York to the Northern District of Texas".

The present hearing is on that motion.

On the merits of petitioner's present motion, the only question is as to the meaning and application of §1404(a) of Title 28, United States Code. This supplemental brief is confined to that question.

The preliminary questions whether this Court has jurisdiction to issue a writ of mandamus or certiorari in this case, and if so, whether this Court should exercise its discretion to issue such a writ, are discussed at pp. 7-13 of our brief of December 3, 1948.

Summary of Argument

Section 1404(a) of Title 28, United States Code, reads:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer *any civil action* to any other district or division where it might have been brought".

Petitioner contends that an indefinite number of unexpressed exceptions—including one covering cases such as his own—must somehow be judicially read into those simple words. When confronted with an unequivocal statement by the authors of the section that it was drafted to specifically include Federal Employers' Liability Act cases, petitioner is forced to the position (a) that the authors of the section did not mean what they said, (b) that their views are immaterial and (c) that Congress in some way intended to do something different from what the authors meant.

We submit that the language of the statute is plain and unambiguous, and that it means just what it says. There is no inconsistency between the statutes involved, and no basis for the argument against implied repeals. Any doubts as to the application of § 1404(a) are set at rest by the Reviser's note, which shows that the section was drafted in its present inclusive form with the specific intention

(a) of including Federal Employers' Liability Act cases,

(b) of giving the district courts power to deal in particular cases with any possible inequitable results that might arise from the decision of this Court in *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44 (1941).

For nearly three years before the enactment of the section, Congress had full information as to its purport. In the light of that information Congress adopted the language proposed. Its considered declaration of policy, which accords with the natural and simple meaning of the language, should be followed.

POINT I.

THERE IS NO INCONSISTENCY BETWEEN § 1404(a) OF THE JUDICIAL CODE AND § 6 OF THE FEDERAL EMPLOYERS' LIABILITY ACT, AND HENCE NO BASIS FOR APPLICATION OF THE PRESUMPTION AGAINST IMPLIED REPEALS.

Section 6 of the Federal Employers' Liability Act, as amended in 1910 (45 U. S. C. 56), provides:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

Petitioner contends in substance that the so-called "specific language" of this section is inconsistent with the so-called "general language" of § 1404(a) of the Judicial Code, that it must be presumed that the "general language" of the later statute was not intended to repeal the "specific language" of the earlier one, and that therefore an implied exception for Federal Employers' Liability Act cases must be read into § 1404(a). Alternatively phrased, his contention is that § 6 of the Federal Employers' Liability Act fills the entire field of venue for actions arising under that Act, leaving nothing upon which § 1404(a) can operate.

This argument is without merit. Properly interpreted, there is no inconsistency between the two sections. They are in *pari materia* and should be read together according to their natural meaning as a harmonious whole.

It may be quite true, as petitioner points out, that prior to the enactment of the Judicial Code in 1948, it had been established by this Court that the choice of forums given to plaintiff by the Federal Employers' Liability Act filled the entire field of venue under that Act and could not be frustrated for reasons of convenience or expense. It was on that premise that a majority of this Court in *Baltimore and Ohio Railroad Company* v. *Kepner*, 314 U. S. 44 (1941), held that a state court at the residence of the plaintiff could not enjoin him from prosecuting an action in a federal court of another state. But Mr. Justice Reed, speaking for the majority in that case, and commenting upon the possible result of the Court's decision, added (314 U. S., at p. 54):

> "If it is deemed unjust, the remedy is legislative * * *."

Congress has now supplied a legislative remedy in § 1404(a), which provides that in a specific case where the interests of justice and the convenience of parties and witnesses are shown to require it, an appropriate transfer may be made of "any civil action". It cannot be denied that an action brought under the Federal Employers' Liability Act is a "civil action". Thus, the field of venue in actions under that Act is now occupied by both § 6 and § 1404(a).

There is no inconsistency between the two sections. The privilege of bringing suit afforded by § 6 has not been abridged or destroyed. That section, as before, permits the plaintiff to sue:

(i) in the district where the defendant resides,

(ii) in the district where the cause of action arose,

(iii) in any district where the defendant is doing business.

The wide choice of forums thus given to a plaintiff remains completely unimpaired. § 1404(a) merely provides that if in a particular case a particular plaintiff exercises his choice in a manner inconsistent with the interests of justice, the district court shall have power to deal with the situation—not by dismissal or injunction, but by a simple order of transfer. Rightly considered, indeed, the situation is the exact opposite of what petitioner contends. His claim is (i) that § 6 is an earlier specific statute, (ii) that § 1404(a) is a subsequent general statute, and (iii) that therefore the earlier specific statute must prevail. With much more reason it may be said (i) that § 6 is a general statute dealing with all Federal Employers' Liability Act cases, and (ii) that § 1404(a) is a subsequent specific statute dealing only with those cases where hardship and inconvenience are established. Full effect can be given to both, and the intention of Congress can be fully carried out, if we read the two statutes together as providing simply that a plaintiff may bring his suit originally in any of the districts specified under § 6, subject to the right of the trial court to order transfer under § 1404(a) where the need for transfer is affirmatively established.

Section 6 states that "an action may be brought" in any of the districts specified. It does not require that the action, though properly "brought", must remain there regardless of all other circumstances. A majority of this Court in the *Kepner* case felt that, in the absence of legislative authorization, the case must remain where it was "brought". Sec-

tion 1404(a) now fills the gap by authorizing the district court, in the exercise of a sound discretion, to transfer a particular case to another district or division where it might have been "brought" in the first instance. Such a transfer will only be made where the defendant sustains the burden of establishing to the satisfaction of the court that the transfer is required for the convenience of parties and witnesses, *and* in the interest of justice. The facts of the present case well exemplify the desirability of giving the district court such discretion.

The decision of a motion for transfer will, of course, be made, as Judge Maris recently pointed out *Schoen v. Mountain Producers Corporation*, 170 F. (2d) 707, 715, note 20 [C. C. A. 3, 1948]), in the light of the rules for the application of the doctrine of *forum non conveniens* laid down by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947) and *Koster v. American Lumbermans Mutual Casualty Co.*, 330 U. S. 518 (1947).

Consequently, any suggestions that § 6 and § 1404(a) are conflicting, or that § 1404(a) "repeals" § 6, are absurd. Rather, the two statutes are complementary. Both together now "fill the entire field of venue" in regard to actions under the Federal Employers' Liability Act. Each has its place, and each should be given due effect.

POINT II.

THE WORDS "ANY CIVIL ACTION" IN § 1404(a) EMBRACE CIVIL ACTIONS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

Petitioner argues that the words "any civil action" in Section 1404(a) were intended to apply only to those civil actions referred to in Chapter 87 of the Code.

In the first place, this argument runs directly counter to the express declaration of Congress itself. Congress has specifically provided in § 33 of Public Law 773* that the location of a particular section in the Code furnishes no basis for inferences of legislative construction. That section provides:

> "No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, as set out in Section 1 of this Act, in which any section is placed, nor by reason of the catchlines used in such title".

Even a superficial analysis of the Code itself further demonstrates the unsoundness of petitioner's contention.

The phrase "any civil action" is used in many other sections of the Code outside Chapter 87 (*e.g.* § 1335, § 1336, § 1337, § 1338, § 1339, § 1340, § 1343, § 1344, § 1346, § 1347, § 1348, § 1349, § 1350, § 1351, § 1353, § 1357, § 1441, §1446). The derivation of this phrase is given by the Reviser in his notes to each of these sections, and to the sections in Chapter 87 where the phrase is used, in substantially the same language. Typical is the note to § 1351:

> "Words 'civil action' were substituted for 'suits', and 'all suits and proceedings' in view of rule 2 of the Federal Rules of Civil Procedure."

Similarly, in his note to § 1394, which is in Chapter 87 governing venue, the Reviser's note reads as follows:

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*By "Public Law 773" we refer to the Act of June 25, 1948, C. 646, 62 Stat. The whole new Title 28 of the United States Code forms Section 1 of this Act. The remaining sections (2 to 39) are miscellaneous provisions, dealing, *inter alia*, with amendments, definitions, etc.

> "Words 'Any civil action' were substituted for 'All proceedings' in view of rule 2 of the Federal Rules of Civil Procedure."

Rule 2 of the Federal Rules of Civil Procedure specifies:

> "There shall be one form of action to be known as 'civil action' ".

The Advisory Committee notes to Rule 2 state in part as follows:

> "2. Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules."

One further illustration that the phrase "any civil action" in § 1404(a) embraces all civil actions as the term is used in Rule 2 of the Federal Rules of Civil Procedure is found in Amendment No. 29 proposed by the Senate Judiciary Committee on June 9, 1948. As passed by the House of Representatives, subsection (b) of § 1402 referred to "Any tort claim action." The proposed change made by the Senate and enacted into law was to strike out "tort claim action" after "any", and insert the words "civil action on a tort claim." The following explanation was given (S. R. 1559, 80th Cong. 2d Sess., p. 7):

> "This amendment is designed to bring the style of language of this section, which is incorporated directly from the Federal Tort Claims Act, into harmony with that of the revision which has elsewhere uniformly followed the Federal Rules of Civil Procedure in using the term 'civil action' to apply to all such actions."

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Consequently, it is obvious that the phrase "any civil action" was intended to embrace all claims for relief falling within the confines of civil jurisdiction, whether at law or in equity.

The language of § 1404(a) is clear, direct and unambiguous. It applies to "any civil action" without exception. In contrast, § 1445(a) specifically excludes cases arising under the Federal Employers' Liability Act from the operation of Chapter § 89 governing removal of cases from state to federal courts. In other parts of the Code where Congress intended not to have a particular provision apply to a certain class of cases, or certain types of claims, specific exceptions were made from the generic phraseology. For instance, in Chapter 171, entitled "Tort Claims Procedure," § 2680 lists twelve distinct types of claims which are excluded from the operation of that chapter.

Even in Chapter 87, where § 1404(a) is found, actions under the Federal Employers' Liability Act are specifically exempted from the operation of § 1391(b)—the "general" venue statute otherwise operative—by the phrase "except as otherwise provided by law". § 1391(b) provides:

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, *except as otherwise provided by law.*"

In this same connection it must be noted that subdivision (c) of § 1391 extends the definition of corporate "residence" for venue purposes to any district in which a corporation "is incorporated or licensed to do business or *is doing business*", thus directly overruling this Court's old decision in *In re Keasbey and Mattison Company*, 160 U. S. 221 (1895) where it was held that a corporation was only a

"resident" for venue purposes of the state of its incorporation (see *Cummer-Graham Co. v. Straight Side Basket Corp.*, 136 F. (2d) 828 (C. C. A. 9, 1943); *Moss v. Atlantic Coast Line R. Co.*, 149 F. (2d) 701 (C. C. A. 2, 1945); *cf. Suttle v. Reich Bros. Construction Co.*, 333 U. S. 163, 166 [cases collected, note 7] (1948); and discussion in 3 *Moore's Federal Practice* [*Second Edition*], § 19.04, p. 2135-6).

Even with this basic change of substantive law by § 1391(c), if the words "*except as otherwise provided by law*" had not been included in § 1391(b), the venue of Federal Employers' Liability Act cases would now be governed by that section. Consequently, the right of an injured employee to sue an interstate carrier in the district "in which the cause of action arose" would have been taken away.

Yet, the provisions of § 1391(c) put all other foreign corporations in the same venue position as interstate railroads sued under the Federal Employers' Liability Act, with the exception that the railroad may also be sued in the district "in which the cause of action arose" under § 6. This legislative extension of forums in actions against corporations (other than Federal Employers' Liability Act cases) indicates that Congress intended to make the venue of other cases practically co-extensive with the venue provided in § 6 of the Federal Employers' Liability Act. In view of this, there was an obvious need for a statute such as § 1404(a) to provide a means of correcting the inequity of foreseeable oppressive and burdensome suits resulting from this extension.

In view of the foregoing, it is clear that Judge Rayfiel in *Pascarella v. New York Central R. Co.*, 81 F. Supp. 95

(E. D. N. Y. 1948) fell into serious error in holding that the phrase "any civil action" in § 1404(a) refers only to those civil actions enumerated under Chapter 87 of the Code (p. 97). The *Pascarella* case, together with a companion case by the same judge (*Di Giovanni* v. *Baltimore & Ohio R. Co.*, unreported), are the only decisions which we have found holding that § 1404(a) has no application to a civil action under the Federal Employers' Liability Act. At least ten other district court decisions* have reached the opposite conclusion.

POINT III.

THE REVISER'S NOTE TO § 1404(a) SHOWS THAT THE SECTION WAS SPECIFICALLY INTENDED TO EMBRACE FEDERAL EMPLOYERS' LIABILITY ACT CASES.

The opinions of those who were active in drafting §1404(a) will of course be considered by this Court as "highly relevant and material evidence" of legislative intent (*White* v. *Winchester Country Club*, 315 U. S. 32, 41 [1942]; *Shapiro* v. *United States*, 335 U. S. 1, 12 [1948]). Realizing that fact, petitioner attempts at some length in his supplemental brief to explain away the reference to *Balti-*

Hayes v. *Chicago, Rock Island & Pacific R. Co.*, 79 F. Supp. 821 (D. Minn., 1948); *Collett* v. *Louisville & Nashville R. Co.* (E. D. Ill., 1948 [unreported]); *White* v. *Thompson*, 80 F. Supp. 411 (N. D. Ill., 1948); *Nunn* v. *Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 80 F. Supp. 745 (S. D. N. Y., 1948); *Richter* v. *Chicago, Rock Island & Pacific R. Co.*, 80 F. Supp. 971 (E. D. Mo., 1948); *Lindgren* v. *Union Pacific R. Co.* (N. D. Ill., 1948 [unreported]); *Vore* v. *Union Pacific R. Co.* (N. D. Ill., 1948 [unreported]); *Hade* v. *Chicago & Northwestern Ry. Co.* (N. D. Ill., 1948 [unreported]); *Scott* v. *New York Central R. Co.* (N. D. Ill., 1948 [unreported]).

more & Ohio R. Co. v. Kepner, 314 U. S. 44 (1941) in the Reviser's note to that section. The *Kepner* case is cited by the Reviser "As an example of the need of such a provision."

In our brief filed December 3, 1948 (pp. 3-7) we demonstrated that the history of the Reviser's note shows, beyond any doubt, that §1404(a) was specifically drafted to give a district court the discretion to transfer a Federal Employers' Liability Act case.

Its origin stems from a memorandum written by Professor James William Moore to W. W. Barron, who was employed by the former House Committee on Revision of the Laws to do the actual drafting. Professor Moore, concededly one of the foremost authorities in this country on federal practice and procedure, was retained, together with Judge Alexander Holtzoff, United States District Judge for the District of Columbia, as a special consultant to the Revision Staff of the Judicial Code. As Professor Moore stated at hearings on the Revised Code (*Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 80th Cong. 1st Sess.*, on H. R. 1600 and H. R. 2055, March 7, 1947, p. 25):

> "My chief function was to advise on matters of Federal jurisdiction, practice, and other problems related thereto. I have no financial interest in the enactment of the proposed revision."

On March 7, 1945, Professor Moore wrote to Mr. Barron proposing statutory recognition of the doctrine of *forum non conveniens* and provision for transfer to a more convenient forum. He went on to note:

> "In my opinion the District Court for the Eastern District of New York should have had the power in the situation presented in the *Kepner* case, 314 U. S.

14, 62 S. Ct. 6, to transfer the action under the Federal Employer's Liability Act to a federal court in Ohio where the accident occurred and the employee resided and which would have been a proper venue."

That the Reviser adopted Professor Moore's opinion is proved by the fact that a few months later § 1404(a) appeared in the Second Draft of the Code, together with the following Reviser's note:

> "Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper. The author gave as an example for the need of such provision *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

Petitioner is wrong in asserting in his supplemental brief (p. 13, note 23) that the Reviser's note to § 1404(a) remained unchanged from October 30, 1945 to the date of enactment. The fact is that when the first part of the Revised Code was first submitted to the Committee on Revision of the Laws of the House of Representatives on October 30, 1945, the language of the Reviser's note to § 1404(a) was identical with the note in the Second Draft quoted above (*Revision of Federal Judicial Code [Preliminary*

Draft], *October 30, 1945*, pp. 273-4 (). The note was changed slightly between that time and April 25, 1947, when House Report No. 308 was printed. Thus, it cannot be questioned that nearly three years prior to the final passage of the Revised Code, the attention of Congress was specifically drawn to the fact that §1404(a) was new and was drafted with Federal Employers' Liability Act cases in mind, in accordance with Professor Moore's memorandum to the Reviser.

To show the continuity between Professor Moore's memorandum of March 7, 1945 and the final text of the Reviser's note to §1404(a), it may be noted that Professor Moore's erroneous spelling of "Employer's," instead of "Employers'" (see historical note to 45 U. S. C. § 51), has been carried over into the final Reviser's note.*

In view of the foregoing, Judge Rayfiel was clearly wrong when he said in *Pascarella* v. *New York Central*,

*In an article entitled "The Inconvenient Federal Forum", 60 Harvard Law Review, 908, 933 (1947), the Reviser's note receives this comment:

> "If the pending proposal for the revision of the Judicial Code is adopted, it will go further to establish the doctrine of *forum non conveniens* on the second basis suggested—trial convenience—than any court could go. Section 1404(a) of the pending bill provides: 'For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.' The committee report states that this provision 'was drafted in accordance with the doctrine of *forum non conveniens*,' and cites *Baltimore & Ohio R.R.* v. *Kepner* 'as an example of the need of such a provision.'"

This Court, in *United States* v. *National City Lines*, decided prior to the enactment of § 1404(a), referred with approval to this article (334 U. S. at p. 589, note 35).

81 F. Supp. 95, 97 (E. D. N. Y., 1948) that the "mere reference" in the Reviser's note to the *Kepner* case was no evidence of legislative intent. As pointed out above, the rule of the *Kepner* case and the suggested legislative correction of the resulting inequities were called to the attention of Congress as early as October 30, 1945.

POINT IV.

THERE IS NO SUBSTANCE TO PETITIONER'S ARGUMENT THAT THE PLAIN MEANING OF § 1404(a) SHOULD BE REJECTED BECAUSE IT IS "CONTROVERSIAL."

Petitioner argues in his supplemental brief that what "Congress had authorized and believed it was passing upon was an expert revision and codification" [p. 8], and that, therefore, the Court cannot presume that Congress intended to change the "highly controversial field of private rights between railroads and injured employees" by the enactment of § 1404(a).

The speciousness of this argument may be first demonstrated by the fact that the Revised Judicial Code does make a great number of important changes in substantive and procedural law. We have noted above the important extension of venue against corporations made in § 1391(c). The procedure for the removal of cases is completely altered in §§ 1441-50. Section 2283, as the Reviser's note expressly states, is intended to overturn the rule laid down in *Toucey v. New York Life Insurance Company*, 314 U. S. 118 (1942). The list of other major innovations wrought by the Code could be continued *ad infinitum*, as a study of the Reviser's notes will show.

In House Report 308, dated April 25, 1947, favorably reporting the revised code to the floor of the House of Representatives, it was noted that minor changes had been made in the provisions regulating the venue of district courts "in order to clarify ambiguities or to reconcile conflicts". These changes are reflected in the Reviser's notes under sections 1391-1406. (H. R. 308, 80th Cong., 1st Sess., p. 6).

But, says petitioner, the changes intended to be made by Congress were only of a "non-controversial" kind, and the field of private rights between railroads and injured railroad employees was "highly controversial". In support of this thesis, petitioner points to the fact that the Jennings Bill (H. R. 1639, 80th Congress; H. R. 242 and H. R. 6345, 79th Congress) only passed the House of Representatives by a vote of 203 to 188, with 38 members not voting (93 Cong. Rec. 9193-4), and that the bill never reached the floor of the Senate.

The Jennings Bill and its failure of passage are wholly irrelevant to the interpretation of § 1404(a) of the Judicial Code. The Jennings Bill and § 1404(a) were drafted with entirely different purposes in mind and have nothing in common. The Jennings Bill deals solely with venue. § 1404(a) deals not with venue but with transfer. There is nothing inconsistent in the passage of § 1404(a) and the failure of passage of the Jennings Bill, and nothing in that failure which would require this Court to distort the plain words of 1404(a).

The Jennings Bill proposed to amend Section 6 of the Federal Employers' Liability Act by eliminating the broad power of the plaintiff to select the forum in which the action

would be tried. It then proceeded to amend Section 51 of the old Judicial Code (28 U. S. C. A. § 112), as follows:

> "A civil suit for damages for wrongful death or personal injuries against any interstate common carrier by railroad may be brought only in a District Court of the United States or in a State Court of competent jurisdiction, in the district or county (parish), respectively, in which the cause of action arose, or where the person suffering death or injury resided at the time it arose:
>
> "Provided, that if the defendant cannot be served with process issuing out of any of the Courts aforementioned, then and only then, the action may be brought in a District Court of the United States, or in a State Court of competent jurisdiction, at any place where the defendant shall be doing business at the time of the institution of said action."

First, it is to be noted that the Jennings Bill repealed the venue provisions of § 6 of the Federal Employers' Liability Act and specifically limited the venue of actions to the district (i) in which the cause of action arose, or (ii) in which the person suffering death or injury resided, at the time it arose—unless process could not be served upon the defendant in either of those districts. Only in that event could the defendant be sued in any district where it did business.

The purpose of the bill was stated to be "to eliminate ambulance chasing and racketeering primarily in the matter of employers' liability suits under the Federal Employers' Liability Act" (93 Cong. Rec. 9178). A reading of the entire debate on the bill shows that there was no real controversy regarding this legislative aim (93 Cong. Rec. 9100-

9108, 9178-9194). The controversy arose as to the efficacy of the bill to accomplish this aim, and as to whether it did not go much too far. Debate particularly arose as to the following matters:

1. The bill embraced not only actions under the Federal Employers' Liability Act but also all other actions against railroads for wrongful death or personal injuries. Although no testimony had been adduced at the hearings regarding the improper solicitation or "transportation" of negligence cases other than those arising under the Federal Employers' Liability Act, the bill applied equally to such diverse plaintiffs as passengers, casual bystanders on railroad property and motorists involved in grade-crossing accidents.

2. The bill merely limited the venue of actions against interstate common carriers by rail. It did not purport to touch the venue of actions against interstate common carriers by bus, vessel or airplane.

3. The bill went so far as to regulate the venue in state court actions against railroads arising, not under federal statute, but under common law. On this score there was a serious question of its constitutionality.

4. The bill discriminated as between actions for wrongful death or personal injuries and actions for property damage. In actions for property damage, a plaintiff could sue in any district where the defendant railroad could be served. In actions for death or personal injuries, a plaintiff could only sue in the districts prescribed by the bill.

5. In cases covered by the bill, where the defendant railroad was incorporated in a state other than the

state where the accident occurred or the plaintiff resided, the railroad could not even be sued in the state of its incorporation, unless jurisdiction could not be obtained in either of the other specified districts.

6. In an action for wrongful death, an administrator could not sue in the district where he resided but might be forced to go to the district where "the person suffering death or injury resided at the time it arose."

To summarize, there was serious question in the House of Representatives whether the entire legal basis for the venue of all personal injury actions against railroads should be upset and confused merely in order to drive out some racketeers who were soliciting and transporting employee actions under the Federal Employers' Liability Act. Yet, it was generally recognized that the racket had become acute because of this Court's opinions in *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44 (1941) and *Miles v. Illinois Central R. Co.*, 315 U. S. 698 (1942), and that the resulting abuses needed correction. That correction has been supplied by § 1404(a).

In the last analysis, the Jennings Bill is completely irrelevant to the question whether § 1404(a) includes Federal Employers' Liability Act cases, except to show that the "temper of legislative opinion" was not adverse to correcting the abuses which had developed as a result of this Court's decisions in the *Kepner* and *Miles* cases.

As Judge Kaufman in the Southern District of New York said on this very point in *Nunn v. Chicago, Milwaukee, St. P. & P. R. Co.*, 80 F. Supp. 745, 748 (1948)

"Why the Jennings Bill was not enacted seems immaterial, but it is entirely possible that Congress felt such a law unnecessary for the very reason that such change as was deemed desirable would follow from Section 1404(a) of the new Code."

If there is any room for inference it is only reasonable to infer that the Senate Judiciary Committee, which was considering the new Judicial Code and the Jennings Bill at the same time, believed that the Jennings Bill not only was unwise as going too far but also was unnecessary for the reason that the abuses of improperly solicited and "transported" Federal Employers' Liability Act litigation would be effectively corrected—as the Reviser's note plainly indicated—by the enactment of § 1404(a).

Conclusion

1. Petitioner's motion for leave to file a petition for writ of mandamus or certiorari should be denied.

2. If the motion for leave to file is granted, the petition itself should be denied.

Dated: New York, N. Y.
February 5, 1949

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. 233.
Miscellaneous.

JESSIE A. KILPATRICK,
Petitioner,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

Ex Parte JESSIE A. KILPATRICK,
Petitioner.

BRIEF AS AMICUS CURIAE OF NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY.

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Petitioner.

BRIEF AS AMICUS CURIAE OF NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY.

STATEMENT OF INTEREST.

The *amicus curiae*, New York, Chicago and St. Louis Railroad Company, is defendant in an action brought by Del Vardaman for damages under the Federal Employers' Liability Act bearing cause No. 6908 in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, sitting in St. Louis, Missouri. Vardaman, and all the witnesses disclosed, reside in

Fort Wayne, Indiana, a distance of three hundred forty miles from St. Louis. A motion to transfer the cause to the Fort Wayne division of the Northern District of Indiana is on file and is now under submission. The Vardaman case was filed September 3, 1948, three days after the Judiciary Act became effective, and the question of retroactive application of Section 1404 [a] of the Judicial Code is not there involved. The method by which this and related cases come to this court are not involved in the Vardaman case, but the amicus is directly interested in the neat question of law: **does Section 1404 [a] apply to cases arising under the Federal Employers' Liability Act?**

ARGUMENT.

We leave discussion of the cases deciding the question in the district courts to the parties. A list of those known to the amicus is contained in Appendix II.

The proposition we address ourselves to may be expressed as follows:

> Congress could not have intended that the general language of 1404 [a] of the Judiciary Act should apply to the venue section of the F. E. L. A.,
>
> (a) Because of the presumption against implied repeal of a specific statute by a subsequent later statute, and
>
> (b) Because of the legislative histories of the Judiciary Act and of the contemporaneous Jennings bill.

(a)

The basis of argument (a) is the rule of law:

> "Implied repeals are not favored, and if effect can be reasonably given to both statutes, the presumption is that the earlier is intended to remain in force." U. S. v. Burroughs, 289 U. S. 159.

This point proceeds upon the assumption that Section 1404 [a] is inimical to Section 56 of the F. E. L. A.; that they cannot both stand side by side and that one must necessarily prevail over the other. The Sections are as follows:

28 U. S. C. A.—Judiciary and Judicial Procedure Act of 1948:

Sec. 1404 [a]:

> "For the convenience of parties and witnesses, in the interest of justice, a District Court may transfer

any civil action to any other district or division where it might have been brought."

45 U. S. C. A. 56 (in part):

"Under this chapter an action may be brought in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such an action. The jurisdiction of the courts of the United States under this Chapter shall be concurrent with that of the courts of the several states, and no case arising under this Chapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

It is evident from a reading of Section 56 that the F. E. L. A. goes no farther than to designate the courts in which the plaintiff **may bring** his action. It is clear that in the absence of any statute authorizing the transfer of such cases from one district to another, neither the Federal Court nor the State Court can thwart the enactment of Congress by restraining the prosecution of a suit in a court designated by this Section. B. & O. v. Kepner, 314 U. S. 44; Miles v. I. C. R. R., 315 U. S. 698. However, where there is either a particular or a general authority to transfer such a cause there is nothing contradictory between such authorization and leave to bring such a suit in such a district. The suit is, indeed, brought in the district of the plaintiff's choice, but it is transferred after the filing permitted by Section 56 is completed.

This situation commonly exists in most jurisdictions. For example, in the State of Missouri, Section 871, R. S. Mo. 1939, describes the venue in which civil actions may be brought; Section 1062, however, authorizes transfer of the cause on change of venue to an adjoining or next adjoining circuit convenient to the parties for the trial of

the case, even though the district to which the cause may be removed may not be one which would have original jurisdiction under the venue statute, Section 871. It has never been claimed that there is anything inimical in these two statutes and there is no more reason in logic or in law why Section 1404 [a] should be held inimical to Section 56 than that Section 1062 should be inimical to Section 871.

This situation exists in each of the States. Notwithstanding the absolute right given a suitor to commence an action in a given county—frequently, as in the case of multiple defendants, with an absolute right to a choice of venue—the court may grant a change of the venue to another county against the suitor's will.

An appendix to this brief cites the venue provisions and the change of venue provisions in the several States. It is interesting to note that the principle of forum non conveniens as a ground of change of venue is explicit in the statutes of almost half of the States. Similar situations existed under the old Federal Judicial Code. Title 28, Section 114, designated the divisions within districts which suits might be brought. Section 119 provided for transfers to other divisions on stipulation. Section 163 made the same provisions for cases in Maine. Adverse change of venue was permitted in Arizona (Section 143). Montana (Section 172), New Mexico (Section 177). Ohio (Section 181), and formerly Indiana (Section 120). The first three of these sections express the doctrine of forum non conveniens. Section 121 authorized transfers to new districts.

Indeed, Sections 1391 [c], 1391 [d], 1392 [b], 1993 [b], 1395 [a], 1395 [c], 1395 [d], 1395 [e], 1396, 1397, 1398, 1400 [a], 1400 [b], 1401 and 1402 [b] of the new Federal Judicial Code all give the plaintiff a choice of venue.

The choice of venue given the plaintiffs in each of these sections is no more and no less absolute than the choice of

venue given under the F. E. L. A. The wording of this section of the F. E. L. A., "an action may be brought," is repeated again and again in the sections just referred to. Yet Section 1404 [a], permitting a transfer by the District Court in derogation of the plaintiff's choice, was drafted as a portion of the identical chapter which gave the choice of venue in each of these fifteen instances. Indeed, Section 1404 [a] permits transfer only to another division "where it might have been brought." It is quite plain, therefore, that while this chapter intended to grant a choice of venue to plaintiffs in the first instance, it was intended that their choices should be controlled by the District Court.

It is, therefore, demonstrated that there was no implied repeal of any part of Section 56 of the F. E. L. A. by the adoption of Section 1404 [a]. Section 56 still designates the districts in which such suits may be brought, and that is where such suits will be tried, as they have been heretofore, unless a change of venue is applied for under Section 1404 [a].

Full effect can still be given, and should be given, to Section 56 of F. E. L. A. This is the precise effect which will be given to the specified paragraphs of Sections 1391 to 1402 of the Judiciary Act. Section 56 has never done more than designate the districts in which suits may be brought. Suits may now be brought there as formerly. That actions may now be transferred therefrom when the court finds that convenience and justice so require in no way modifies or changes the declaration of the statute.

(b)

The argument derived from the legislative histories of the bill and of the contemporaneous Jennings bill[1] proceed from the same false premise.

[1] H. R. 242, 79th Congress, 1947; H. R. 635, 79th Congress, 2d Session; H. R. 1639, 80th Congress, 1st Session, 1947.

The Jennings bill would have amended Section 56 of Title 45 by more narrowly limiting the districts where suits under F. E. L. A. might be brought, irrespective of considerations of convenience and justice. It is one thing to foreclose a particular district court to an injured employee altogether. This the Jennings bill would have done. (So would the proposal of Congressman Devitt have done. 34 A. B. A. Journal 532.) It is quite another to admit him to that court conditionally upon the court's determination that to do so is not inconvenient to the parties and witnesses nor against the interests of justice. It is by no means inconceivable that the same Congressman would vote against the one and for the other. Indeed, modern tendency in the development of Federal procedure (e. g., Hickman v. Taylor, 329 U. S. 495, and the amendments to Rules 27, 33 and 34 of the Rules of Civil Procedure, effective March 1, 1948), is to accord Federal District Court Judges greater and greater discretionary powers, which would lead us to expect just such a combination of legislative votes as was here cast.

We have noted that there is nothing in Section 56 of F. E. L. A. which requires the **trial** of the cases in the district where the suit is filed. By its terms it only regulates the place of **filing** such suits. Since there is no federal common law (Erie R. Co. v. Tompkins, 304 U. S. 64), and since Congress had enacted no applicable rule of forum non conveniens nor any mode of transfer, the Supreme Court held quite logically that the case being filable in a certain court it should be tried there (B. & O. v. Kepner, supra).

There can hardly be more cogent extrinsic proof of legislative intent than the report of the committee which drafts the bill to the enacting body. The report of the committee on the Judiciary of April 25, 1947, accompanying H. B. 3214, being Report No. 308 of the 80th Congress, 1st

Session, simply forecloses the contention that Section 1404 [a] does not mean what it says.

The report, to which the reviser's notes were annexed, reads:

> "The reviser's notes are keyed to sections of the revision and explain in detail every change made in text. **References to court decisions are supplied wherever necessary or appropriate.**"

The reviser's notes themselves on Section 1404 [a] read:

> "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. **As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio.** The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

This report and the reviser's notes were before Congress from April, 1947, till the adoption of the Code in June, 1948.

It will not do to say that the drafters (the reporting committee) and the enacters (the Congress) did not mean to make 1404 [a] applicable to cases arising under F. E. L. A. when the report of the one to the other pursuant to which the law was adopted expressly stated not only that this was intended, but that the decisions construing this clause of the F. E. L. A., and which plaintiff insists were not affected, were the very occasion for the enactment of 1404 [a].

It has been stated that this change in the provisions of the F. E. L. A. is a controversial matter, that the bill was described as non-controversial by some of the Senators and Congressmen, and, therefore, that Congress could not have intended this change. Congressmen supporting the Code have been quoted as seeking to avoid controversial substantive changes of law "wherever possible and whenever possible" (Congressman Keogh, quoted in U. S. Code Congressional Service, 28 U. S. C., p. 1945). It is plain that this was not always and everywhere possible. For one example compare the note to Section 2283 and Toucey v. New York Life, 314 U. S. 118. See also reviser's notes to Sections 1391, 2406 and 2461, the debate on the Tax Court provisions (U. S. Cong. Serv., 28 U. S. C., p. 1992 et seq.), and Senator Donnell's remarks quoted ibid, p. 2029: "Extensive hearings were held, at which various controversial matters, and particularly one controversial matter, relating to the Tax Court, were heard."

However, non-controversial Congressmen hoped to be, it is not their hopes that control; what they did is what counts, and this is another and even more fundamental rule of statutory construction.

In Caminetti v. U. S., 242 U. S. 470, 490, the title "White Slave Traffic Act," and the report of the committee to the House strongly indicated that the act was directed to control commercialized vice and not to individual acts of immorality. Yet the court held:

> "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation (citing authorities). But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the

legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See Mackenzie v. Hare, 239 U. S. 299, 308."

(c)

In the new Judicial Code Congress authorized the transfer of "any civil action." There are no exceptions. This is a civil action. If there is extrinsic evidence that Congress did not expect the section to apply to cases arising under the F. E. L. A., such evidence is of no consequence, for Congress did not enact any such intention, but the precise opposite.

This rule of construction applies to any written expression of intent. It is most pungently put by Mr. Justice Pitney in Chater v. Carter, 238 U. S. 572, 584:

"The guiding principle must be, to seek the intention of the settlor. We mean, of course, his intention as expressed. Not, What did he intend to say? but, What did he intend by what he did say? must be the test."

Respectfully submitted,

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APPENDIX I.

Coexisting Permissive Venue Statutes and Adversary Change of Venue Statutes.

State Code	Venue	Change of Venue	Forum Non Conveniens by Express Statute?
Alabama 1940	Tit. 7, par. 5	Tit. 7, par. 65	
Arizona 1939	Ch. 21, Art. 101	Ch. 21; Art. 104	Yes
Arkansas 1937	Sec. 1398	Sec. 14340	
California Civil Procedure	Sec. 395	Sec. 397	Yes
Colorado Civil Procedure 1935	Rule 98	Rule 98	Yes
Connecticut 1930	Sec. 5444	Sec. 5451	Yes
Delaware Const.	Art. 7	Art. 1	
Florida 1941	Sec. 46.01	Sec. 53	
Georgia 1933	Ch. 3, Sec. 201	Secs. 207-208	
Idaho 1932	Tit. 5, Sec. 404	Sec. 406	Yes
Illinois 1947	Ch. 110, Sec. 129	Ch. 146, Sec. 20	
Indiana 1933	Tit. 2, Sec. 707	Sec. 1401	Yes
Iowa	Sec. 616.17	Sec. 167	
Kansas	Ch. 60, Sec. 509	Sec. 511	
Kentucky Civil	Secs. 79-80	R. S. '43, 452.010	
Lodisiana Practice	Art. 162	Art. 342.12	
Maine 1944	Ch. 99, Sec. 9	Ch. 100, Sec. 24	
Maryland	Art. 75, Sec. 157	Art. 75, Sec. 157	
Massachusetts	Ch. 223, Sec. 1	Sec. 13	
Michigan 1929	Sec. 13997	Sec. 13998	
Minnesota 1945	Sec. 542.09	542.11	Yes
Mississippi 1942	Sec. 1403	Sec. 1443	
Missouri 1939	Sec. 871	Sec. 1062	
Montana	Sec. 9096	Sec. 9098	Yes
Nebraska 1943	Ch. 25, Sec. 409	Sec. 410	
Nevada 1929	Sec. 8571	Sec. 8572	Yes
New Hampshire 1924	Ch. 328, Sec. 1	Sec. 3	Yes
New Jersey 1937	Tit. 2, Sec. 27-19	Sec. 27-20	
New Mexico 1941	Ch. 19, Sec. 501	Sec. 503	
New York Civil Practice Act	Sec. 182	Sec. 187	Yes
North Carolina 1943	Ch. 1, Sec. 82	Sec. 83	Yes
North Dakota 1943	Ch. 28, Sec. 0405	Sec. 0407	Yes
Ohio	Sec. 11277	Sec. 11415	
Oklahoma	Sec. 139	140	

State Code	Venue	Change of Venue	Forum Non Conveniens by Express Statute?
Oregon C. L.	Tit. 1, Sec. 403	Sec. 404	Yes
Pennsylvania General S.	Tit. 12, Ch. 1, Sec. 101	Secs. 111, 113	
Rhode Island 1938	Ch. 511, par. 2	Ch. 496, par. 21	
South Carolina 1942	Sec. 422	Sec. 426	Yes
South Dakota 1939	Title 33, Sec. 0304	Sec. 0306	Yes
Tennessee 1938	Sec. 8640	Sec. 868[illegible]	
Texas 1925	Art. 1995	Art. 2170	
Utah 1933	Sec. 104-4-7	Sec. 104-4-9	Yes
Vermont 1933	Sec. 1565	Sec. 1567	
Virginia 1942	Sec. 6049	Sec. 6175	
Washington	Sec. 205-1	Sec. 209	Yes
West Virginia 1937	Sec. 5517	Sec. 5699	
Wisconsin 1947	Sec. 261.01	Sec. 261.04	Yes
Wyoming 1931	Sec. 89-708	Sec. 89-1101	Yes

APPENDIX II.

Cases known to the amicus in which transfer under 1404. [a] of a case arising under F. E. L. A. has been decided:

Transfer allowed:

Hayes v. Rock Island, Minn. 4th Div., Sept. 25, 1948, 79 F. Supp. 821;

Collett v. L. & N., E. D. Ill., Oct. 18, 1948;

White v. Thompson etc., N. D. Ill., Oct. 4, 1948, 80 F. Supp. 411;

Nunn v. C. M. St. P. & P., So. D. N. Y., Nov. 9, 1948, 80 F. Supp. 745;

Kilpatrick v. Texas & P., So. Dist. N. Y., Nov. 22, 1948.

Transfer denied:

Pascarella v. N. Y. Central, E. D. N. Y., Nov. 19, 1948;

Tabor v. So. Railway, E. D. Mo., Nov. 23, 1948.

Related cases:

U. S. v. National City Lines, So. D. Cal., Oct. 12, 1948, 80 F. Supp. 734;

Stevenson v. Erie, S. D. N. Y., June 11, 1948, 80 F. Supp. 393, collating authorities discussing legality of contracts limiting venue choice under F. E. L. A.

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Ex Parte JESSIE A. KILPATRICK,

Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Jessie A. Kilpatrick, a resident of Alabama, moves the Court for leave to file the petition hereto annexed for a writ of mandamus or certiorari pursuant to Section 1651 (a) of the Judicial Code (28 U. S. C. A. 1651 (a)), and further moves that an order and rule be entered and issued directing the Honorable John C. Knox, United States District Judge for the Southern District of New York, to show cause why a writ of mandamus should not be issued in accordance with the prayer of the Petitioner.

and why the Petitioner should not have such other and further relief as may be just in the premises.

Dated: November 23, 1948.

JESSIE A. KILPATRICK,
Petitioner.

By: WILLIAM H. DEPARCQ
2535 Rand Tower
Minneapolis 2, Minnesota.

GERALD F. FINLEY and
ARNOLD B. ELKIND
545 Fifth Avenue
New York 17, N. Y.

Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. .....

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent,

Ex Parte JESSIE A. KILPATRICK,

Petitioner.

PETITION FOR WRIT OF MANDAMUS OR CERTIORARI AND BRIEF IN SUPPORT THEREOF

Petition

Jessie A. Kilpatrick prays for the issuance of a writ of certiorari to the District Court of the United States for the Southern District of New York, or for a writ of mandamus to the Honorable John C. Knox, United States District Judge for the Southern District of New York, directing the nullification of an order of the Honorable John C. Knox entered in the office of the Clerk of the District Court for the Southern District of New York on November 22, 1948 (Appendix page iii), which order provides for a transfer of the files in this action from the Southern Dis-

trict of New York to the District Court of the United States for the Northern District of Texas, and this writ of mandamus is sought upon the ground that the District Court does not have the power to make such an order.

Summary Statement of Matter Involved

Principal Question Passed on by the District Court

The District Court determined that it was empowered by Section 1404 (a) of the Judicial Code (28 U. S. C. A. 1404 (a)) to order the transfer of a case brought there under the Federal Employers' Liability Act (45 U. S. C. A. 51-56), and therefore applied the doctrine of *forum non conveniens* for the purpose of directing a transfer although the Supreme Court had previously decided that the choice of venue could not be frustrated in such a case by the application of the doctrine of *forum non conveniens*.

Summary of Facts

The Petitioner, while employed in interstate commerce by The Texas and Pacific Railway Company at Big Spring, Texas, was involved in an accident on November 20, 1946, as a result of which he lost both his legs. He filed suit pursuant to the Federal Employers' Liability Act in the United States District Court for the Southern District of New York on December 23, 1946.

This Court is fully familiar with the proceedings there. The case was dismissed on July 16, 1947 (72 F. Supp. 635). An appeal was taken to the Circuit Court of Appeals and the judgment of dismissal was reversed on March 4, 1948 (C. C. A. 2, 166 F. (2d) 788). The railroad petitioned this Court for certiorari which was denied on October 11, 1948 (No. 73).

On September 12, 1947, approximately nine months after instituting the New York action, Petitioner filed an action in the United States District Court for the Northern District of Texas, which Petitioner sought to dismiss in March, 1948. The Petitioner's motion to dismiss his action in Texas was unconditionally denied, an appeal was taken to the Fifth Circuit Court of Appeals and this Court has before it undetermined a petition for a writ of certiorari to the Fifth Circuit Court of Appeals and for a writ of prohibition to the District Court for the Northern District of Texas (Miscellaneous No. 119, No. 275).

Basis of Court's Jurisdiction

The jurisdiction of this Court is invoked pursuant to Section 1651 (a) (28 U. S. C. A., 1651 (a)), which provides that the Supreme Court and all Congressional courts may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.

Questions Presented

The principal questions involved are:

(A) Whether this is an appropriate case for the Court to exercise its power to issue all necessary writs (28 U. S. C. A. 1651(a) in the light of the facts that

(a) the matter involved lies outside the issues of the case,

(b) that no decision of the suit on the merits can redress any injury done by the order,

(c) that unless it can be reviewed under Section 1651 (a) it can never be corrected without irreparable

prejudice to Petitioner even though beyond the power of the District Judge and

(d) that the question involved is whether the court below had the judicial power to order the transfer.

(B) Whether Section 1404 (a) empowers a District Judge to vitiate the venue selection of an injured workman suing under the Federal Employers' Liability Act by directing a transfer to a venue other than that of his original choice. District Judge Rayfiel in the Eastern District of New York has answered this question in the negative in *Pascarella* v. *New York Central*, decided November 19, 1948 (see opinion in Appendix, pp. xv to xxiii).

Reasons Relied on for Allowance of Writ

By the Federal Employers' Liability Act (45 U. S. C. A. 51-56). Congress has thrown a humanitarian protective mantle about the shoulders of the injured railroad employee, and one of the advantages given the railroad man to partially offset the disadvantages of having to sue his employer to recover damages for injuries received in industrial accidents and the requirement that negligence be established is the right or privilege of venue selection in any place where the railroad is found to be doing business. This right or privilege has proved in practice to be of immeasurable value to the injured employee in getting away from judges considered to be unsympathetic and getting before those considered to be more favorable, in escaping courts with burdensome procedures and seeking out courts where procedures made the going simpler, and in getting away from juries thought to be small-minded in the matter of verdicts and getting to those where he felt he could reap the richest harvest.

If District Judges have the power to order transfers of Federal Employers' Liability Act cases on the ground of convenience to witnesses, this specially conferred right or privilege is completely frustrated. The question involved therefore transcends the interest of the Petitioner here, who has since December of 1946 been thwarted in its exercise but is a matter of national importance to thousands of other injured railroad employees and their dependents, and men still to be injured.

The question involved here of whether or not the District Judge has the power to order the transfer lies wholly without any of the issues in this case. Assuming that the case proceeds in Texas pursuant to the order of transfer and that judgment is ultimately recovered, that judgment will not redress any injury done by the order even though the order may have been beyond the power of the District Judge.

Section 1651 (a) is not being invoked to correct a mere error in the exercise of judicial power. The contention of the Petitioner is rather that the court has no judicial power to do what it has done and that its action was not merely error but a usurpation of power. It is respectfully submitted, therefore, that this is precisely a situation for invoking the power of this Court under Section 1651 (a). Public interest, furthermore, suggests its speedy determination.

Prayer

For the reasons hereinabove set forth and discussed more in detail with supporting authorities in the accompanying brief, your Petitioner prays for a writ of certiorari to the District Court for the Southern District of New York or a writ of mandamus, or such other writ as to this Court may

seem just and appropriate, to be issued out of this Court directed to the Honorable John C. Knox, United States District Judge for the Southern District of New York, commanding and directing said District Judge to nullify his order of November 22, 1948 transferring this cause out of the Southern District of New York to the Northern District of Texas, to the end that the District Court of the United States for the Southern District of New York and a judge thereof and a jury shall hear and consider the issues between Jessie A. Kilpatrick and The Texas and Pacific Railway Company.

November 23, 1948

JESSIE A. KILPATRICK,
Petitioner.

By: WILLIAM H. DEPARCQ
2535 Rand Tower
Minneapolis 2, Minnesota.

GERALD F. FINLEY and
ARNOLD B. ELKIND
545 Fifth Avenue
New York 17, N. Y.

Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. ..... Miscellaneous

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent,

Ex Parte JESSIE A. KILPATRICK,

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OR MANDAMUS

Reported Opinions

The memorandum opinions of Judge Knox transferring this case to the Fort Worth Division of the United States District Court for the Northern District of Texas are dated November 12, 1948 and November 17, 1948. They are not officially reported but are printed in the Appendix hereto at pages i and ii.

There are also printed in the appendix representative divergent opinions of two District Judges, neither of which opinions is officially reported. The opinion of Judge Rayfiel of the United States District Court for the Eastern District

of New York, in *Pascarella* v. *New York Central Railroad Co.*, in which action Judge Rayfiel held that Section 1404 (a) is not applicable to actions brought under the Federal Employers' Liability Act, is printed in the Appendix (pp. xv to xxiii). The opinion of Judge Kaufman of the United States District Court for the Southern District of New York, in *Nunn* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, in which Judge Kaufman held that Section 1404 (a) was applicable to actions brought under the Federal Employers' Liability Act, is printed in the Appendix (pp. v to xiv).

The history and procedural background of the Kilpatrick litigation may be found by reference to the following published opinions and pending proceedings in this Court:

72 F. Supp. 632;
72 F. Supp. 635;
166 F. (2d) 788, cert. den. —— U. S. —— (October 11, 1948, No. 73).

The proceedings in which certiorari to the Second Circuit was denied by this Court were in "The Texas and Pacific Railway Company, Petitioner v. Jessie A. Kilpatrick, Respondent", being Nos. 839 and 840 in the October 1947 Term of this Court.

Other pending proceedings in this Court involving this litigation are Petitioner's Motion for Leave to File Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals and for a Writ of Prohibition to the District Court for the Northern District of Texas, being Miscellaneous No. 119, the actual petition being numbered 275 in the October 1948 Term of this Court.

Specification of Errors

It is contended that the District Judge erred in assuming that Section 1404 (a) of the Judicial Code (28 U. S. C. A. 1404(a)), which became effective on September 1, 1948, conferred upon him the power to transfer this action to Texas for the convenience of witnesses in spite of the fact that this action was brought under the Federal Employers' Liability Act (45 U. S. C. A. 51-56).

ARGUMENT

Statutes Involved

The statute bearing on the jurisdiction of the Court to issue a writ is Section 1651 (a) of the Judicial Code (28 U. S. C. A. 1651 (a)), which reads as follows:

> "The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."

If the Court grants its writ it will take the problem of construing whether Section 1404 (a) of the Judicial Code has application to cases brought pursuant to Section 6 of the Federal Employers' Liability Act. 1404 (a) of the Judicial Code, effective September 1, 1948 (28 U. S. C. A. 1404 (a)), provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been tried."

Section 6 of the Federal Employers' Liability Act (as amended in 1910 (45 U. S. C. A., 56)), in relevant part provides:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

POINT I

The Court should exercise its power to issue a writ to the District Court pursuant to Section 1651 (a) of the Judicial Code.

Section 1651 (a) carries with it the embodiment of former Section 262. The reviser's note to the new Section 1651 (a) states that the revised section is expressive of the construction recently placed upon such section by the Supreme Court in *U. S. Alkali Export Assn.* v. *U. S.*, 65 S. Ct. 1120, 325 U. S. 196 (1945) and *DeBeers Consol. Mines* v. *U. S.*, 65 S. Ct. 1130, 325 U. S. 212 (1945).

As is pointed out in *U. S. Alkali Assn.* v. *U. S., supra,* the judicial use of these writs both at common law and in the Federal courts have been in appropriate cases to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so. The writ here is not sought

as a substitute for an authorized appeal. The question involved actually, as in the *DeBeers* case, *supra*, respects a matter lying wholly outside the issues in the case. Regardless of the ultimate verdict and judgment in this case, there will be no redress for the injury sustained by the plaintiff if in truth and in fact the court below lacked the power to issue the order of transfer. Petitioner is not asking this Court to review the question of whether or not the District Judge properly exercised his discretion in ordering this transfer; rather, the Petitioner contends that the Court had no judicial power but has instead usurped a power not available to it.

The situation which compelled this Court to issue a writ of certiorari to the District Court of the United States for the Southern District of New York in *DeBeers Consol. Mines* v. *U. S.*, 325 U. S. 212, 217, is not distinguishable in principle from the conditions here, with these additional factors:

(a) that the matter is of national importance to injured railroad employees throughout the country,

(b) that a prompt decision by this Court will prevent a dislocation of Federal Employers' Liability Act litigation throughout the United States,

(c) that in the particular case of this Petitioner it will enable the Court to pass on the question of whether, having established his right to bring an action in the Southern District of New York through two years of heart-breaking litigation, that choice is to be thwarted by the invocation of the doctrine of *forum non conveniens*,

(d) there are already differences of opinion between District Judges as to whether or not Section 1404 (a) is

to be applied to Federal Employers' Liability Act cases (compare the opinion of Judge Kaufman in the Southern District, decided on November 9, 1948, in *Nunn* v. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*—Appendix pages v to xiv, with the decision of Judge Rayfiel in the Eastern District in *Pascarella* v. *New York Central R.R.*, decided on November 19, 1948—Appendix pages xv to xxiii), and

(c) lacking guidance from this Court District Judges and litigants under the Federal Employers' Liability Act will be left in a veritable maze of procedural problems to obtain appellate review.

Ex Parte Republic of Peru, 318 U. S. 578.

POINT II

The District Judge has usurped power not conferred upon him by Section 1404 (a) of the Judicial Code in ordering a transfer of an action brought under the Federal Employers' Liability Act.

The section which the learned jurist believed conferred upon him the authority to order a transfer of this action was Section 1404 (a) of Title 28. This section became effective on September 1, 1948 as the result of a passage by Congress of Chapter 646, Public Law 773, an act "to revise and codify".

Concentrated in that revision in Chapter 87 thereof, dealing with venue in the District Court, are many special venue provisions theretofore found in various statutes of the United States. These provisions are appropriately grouped and restated. Significant omissions are the venue provision of the Federal Employers' Liability Act, the venue provision of the Jones Act (46 U. S. C. A. 688)

and the venue provision of the Anti-Trust Laws (15 U. S. C. A. 1-7).

The learned jurist determined that because of the broad language of the section in the Judicial Code the authority conferred upon the court to transfer actions for the convenience of witnesses extended beyond those cases the venue provisions of which are restated in the Judicial Code and included Federal Employers' Liability Act cases. The result accomplished would be to effectively thwart one of the humanitarian purposes of the Federal Employers' Liability Act, and specifically the special venue provision therein contained which was hallowed by the interpretations of this Court as a valuable right or privilege intentionally conferred upon the injured workman by Congress.

Baltimore & Ohio R. Co. v. *Kepner*, 314 U. S. 44 (1941);

Miles v. *Illinois Central R.R. Co.*, 315 U. S. 698 (1942);

Gulf Oil Corporation v. *Gilbert*, 330 U. S. 501, 503 (1947);

Kilpatrick and Parker v. *The Texas and Pacific Railway Co.*, 166 F. (2d) 788 (1948); cert. den. —— U. S. ——, October 11, 1948;

Akerly v. *New York Central R.R. Co.*, 168 F. (2d) 812 (1948).

The District Judge in reading this section of the Judicial Code has closed his eyes to the purpose of the enactment, to the considerations evidenced in the affiliated statute and to the known temper of legislative opinion.

A

Purpose of the Enactment

The purpose of the enactment of the Code as a whole was, in addition to codification, to revise by substituting "plain language for awkward terms, reconciliation of conflicting laws, repeal of superseded sections and consolidation of related proceedings" (House Report 308, 80th Congress, 1st Sess., Title 28 Congressional Service, p. 1693).

What minor changes were made in the provisions regulating venue were made "in order to clarify ambiguities or reconcile conflicts" (id. p. 1697).

B

Considerations Evidenced in the Affiliated Statute

The Court closed its eyes to the considerations evidenced in the interpretation of Section 6 of the Federal Employers' Liability Act by the Supreme Court of the United States, which affirmed the humanitarian purpose of the Federal Employers' Liability Act and which posturized the venue provision therein as a plain grant of privilege not to be frustrated for the reasons which would authorize a transfer under 1404 (a). While it is true that Congress would have the power to frustrate the choice of venue, it should be abundantly clear that before that plain grant of privilege could be vitiated by Congress an amendment would, of necessity, be required to the Act in which were embodied all of the other laws concerning the rights and privileges of injured railroad employees. Then and then only should the learned jurist below have presumed that Congress had conferred upon him the power to impinge upon or revise or affect those special rights and privileges.

C

The Known Temper of Legislative Opinion

The District Court, in assuming that Congress intended to disturb the field of private rights between railroad employees and railroads otherwise reposed in the Federal Employers' Liability Act, overlooked that this particular field was one of the most controversial fields of private rights and that Congress, in connection with the Jennings Bill during the very session in which the revision of the Judicial Code was passed, failed to pass other legislation affecting the choice of venue under the Federal Employers' Liability Act. (See opinion of Judge Rayfiel in *Pascarella* v. *New York Central R. R. Co.*—Appendix, pages xv to xxiii).

In order to come to the conclusion that Section 1404 (a) was applicable the District Judge also had to disregard the applicable canon of construction against implied repeals (*Washington* v. *Miller*, 235 U. S. 422 (1914)), and many, many statements which were part of the legislative history of this enactment reported in Title 28, United States Code, Congressional Service, at pages 1676, 1941, 1945, 1950, 1972, 1981, 2019 and 2020. At these page references in the Congressional Service will be found the various assurances which were made to Congress that there was nothing in the proposed revision of the Judicial Code which was of a controversial nature, and which assurances induced Congress to pass the revision via the consent calendar and without debate. The interpretation placed upon 1404 (a) by the District Judge would, on the other hand, indicate that Congress had legislated on a most highly controversial subject.

The interpretation consistent with the representations made to Congress would be a codification of the rule expressed in *Gulf Oil Corporation* v. *Gilbert*, *supra*, which expressly excluded from the application of the doctrine of *forum non conveniens* actions brought pursuant to the special venue provision of the Federal Employers' Liability Act.

CONCLUSION

The Court should exercise its undeniable power to issue the writ sought and pass on this vitally important question of whether a Judge of the United States District Court now has the power to frustrate the selection of venue by an injured railroad employee.

Respectfully submitted,

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Counsel for Petitioner.

Dated: New York, November 23, 1948.

APPENDIX

Memorandum Opinion of Judge Knox dated November 12, 1948

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 40-170

JESSIE A. KILPATRICK,

Plaintiff,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY, a corporation,

Defendant.

KNOX, *D.J.*

Plaintiff's motion for a preference is denied. Plaintiff's alternative application for an order striking the answer of the defendant in the event that the defendant proceeds to trial in an action brought by the plaintiff against the defendant in the District Court of the United States for the Northern District of Texas, is also denied. Upon cross-motion by the defendant, under authority of Section 1404 (a) of Title 28 of the United States Code, this case is transferred to the Fort Worth Division of the United States District Court for the Northern District of Texas. *Hayes v. Chicago, Rock Island and Pacific Railroad Co.*, D. C. Minn., September 25, 1948 (unpublished); *Nunn* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, S. D. N. Y., November 9, 1948 (unpublished).

JOHN C. KNOX
U. S. D. J.

November 12, 1948

Memorandum Opinion of Judge Knox dated November 17, 1940

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 40-170

JESSIE A. KILPATRICK,

Plaintiff,

—*vs.*—

THE TEXAS AND PACIFIC RAILWAY COMPANY, a corporation,

Defendant.

KNOX, *DJ*

Notwithstanding the affidavit of William H. DeParcq, dated November 9, 1948, and that of Gerald F. Finley, dated November 11, 1948, and which were filed herein subsequent to November 12, 1948, when my memorandum herein, with respect to defendant's motion to transfer this case to the United States District Court for the Northern District of Texas, for trial, was filed, I shall adhere to the rulings set forth in such memorandum.

The aforesaid affidavits have been read and considered, but I do not regard them as sufficient to warrant a change in my decision of November 12, 1948.

JOHN C. KNOX,
U. S. D. J.

November 17, 1948

Order of Judge Knox dated November 22, 1948

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 40-170

JESSIE A. KILPATRICK,

Plaintiff,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Defendant.

The plaintiff having moved this Court, by notice of motion dated October 27, 1948, for an order of trial preference setting the above entitled action for trial, to appear as the first case assigned on the jury trial calendar of this Court of Monday, November 8, 1948, and

The defendant, pursuant to the direction of Honorable John C. Knox, having moved this Court by notice of cross-motion dated November 3, 1948, for an order transferring this action, pursuant to Section 1404 (a) of Title 28 of the United States Code, to the United States District Court for the Northern District of Texas, Fort Worth Division thereof, and

The motions having duly come on to be heard on the 5th day of November, 1948 before Honorable John C. Knox, and the Court having heard counsel for the plaintiff in support of the plaintiff's motion and in opposition to the defendant's cross-motion and in opposition to the plain-

tiff's motion and due deliberation having been had thereon, and the Court having filed its opinions, dated November 12, 1948 and November 17, 1948, denying plaintiff's motion and granting defendant's cross-motion, it is,

ORDERED, that the motion of the plaintiff for an order of trial preference be, and the same hereby is, denied in all respects, and it is

FURTHER ORDERED, that the motion of the defendant be, and the same hereby is, in the exercise of this Court's judicial discretion in all respects granted, and the above entitled action be transferred to the United States District Court for the Northern District of Texas, Fort Worth Division, and that the Clerk of this Court, upon being presented with a copy of this order, shall during the week of January 17, 1949 forward all of the files in this action to the Clerk of the United States District Court for the Northern District of Texas, Fort Worth Division, together with a copy of this order, unless there shall be a further order of this Court or the Court of Appeals for the Second Circuit or the Supreme Court of the United States staying such direction and transfer.

Dated: November 22, 1948.

JOHN C. KNOX,
U. S. D. J.

Opinion by Judge Kaufman in Nunn v. Chicago, Milwaukee, St. Paul and Pacific R. Co., dated November 9, 1948

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 40-33

LLOYD B. NUNN,

Plaintiff,

—v.—

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY, a corporation,

Defendants.

OPINION

APPEARANCES:

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GERALD F. FINLEY, ESQ.,
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Of Counsel.

EDWARD T. WELCH, ESQ.,
Attorney for Defendant,
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KAUFMAN, *J.*

Plaintiff, a resident of Des Moines, Iowa, sues to recover for injuries suffered in an accident near Clive, Iowa, while he was in the employ of defendant. Defendant moves to transfer the case to the District Court for the Southern District of Iowa, Central Division. The motion presents the question of whether or not the change of venue provision of the new Judicial Code, effective September 1, 1948, Title 28, United States Code, Section 1404 (a), is applicable to actions brought under Section 6 of the Federal Employers' Liability Act, 45 U. S. C. A. 56.

Title 28, United States Code, Section 1404 (a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Section 6 of the Federal Employers' Liability Act reads as follows:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. * * *"

There is no controversy here, as to the following facts. The defendant has no lines of operation in or near New York. While it does maintain a fiscal office and offices for the solicitation of business in the Southern District of New York, its railroading operations are confined to the Middle and Northwest United States. In order to defend the in-

stant action, it will be necessary for defendant to bring from Des Moines or its vicinity to New York, a distance of some 1200 miles, twelve important witnesses, eight of whom are in defendant's employ, and four of whom are physicians who, at one time or another, treated plaintiff for the injuries alleged to have been sustained by him as a result of the accident. Not only will the absence of these employees interfere with the functioning of defendant's line in its Iowa division and greatly inconvenience the physicians involved, but it is estimated that the cost of trying the suit here will be from $4,000 to $5,000, or approximately five times as much as if the case were prosecuted in Iowa. While the case, if left here, will soon go to trial, the calendar in the District Court for the Southern District of Iowa, Central Division, is current and up to date and the case, if transferred, will be heard about the first of next year.

Plaintiff does not dispute that the trial of this case may proceed with greater ease and expediency if venue were laid in a forum closer to the residence of both the suitors and the witnesses. Rather the claim is made that the nature of the venue privilege granted by Section 6 of the Federal Employers' Liability Act and its judicial construction by the Supreme Court render it unlikely that Section 1404 (a) of the new Judicial Code was intended to apply to actions brought under Section 6 of the Federal Employers' Liability Act. This contention is not well founded.

In *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, the plaintiff, a resident of Ohio, brought suit in the Eastern District of New York under the Federal Employers' Liability Act to recover for injuries alleged to have been sustained by him. The railroad sought to enjoin the New York action by proceedings commenced in the State Court of Ohio. The Supreme Court held that the Federal Statute had created a privilege of venue which could not be frus-

trated by considerations of convenience or expense, and therefore a State Court, under its equity powers, could not enjoin an action begun in a distant federal forum in accordance with the provisions of the Act. A similar result was reached in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, where it was held that Section 6 also precluded a State Court from enjoining, on considerations of annoyance, convenience and harassment, a Federal Employers' Liability action in the courts of a sister state. Finally, in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, the Court declared (p. 505): "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*."

The foregoing cases are no longer controlling, or even applicable. Not only were they decided prior to the enactment of the new Judicial Code, when there was no provision of statute similar to 1404 (a), but the legislative history of Section 1404 (a) makes it abundantly clear that it was the very purpose of Congress, in enacting that section, to change the rule which had been approved by the decisions in those cases—a course indicated by the statement of the Supreme Court in the *Kepner* case, *supra*, p. 54, that if the rule "is deemed unjust, the remedy is legislative".

In considering the impact of Section 1404 (a) of Title 28 upon Section 6 of the Federal Employers' Liability Act, it must be recalled that Section 6 goes no further than to provide where the action "may be brought"; it does not say that the action, though properly "brought" in a certain forum, must remain there, and consequently, there is no inconsistency between that section and Section 1404 (a) of the Code authorizing a transfer for the convenience of parties and witnesses in "any civil action". Moreover, there is no room for suggestion that Congress, in enacting the

venue provisions of the new Code, did not have in mind the rights of those protected by the Federal Employers' Liability Act. Such a suggestion is refuted by the provisions of Section 1445 (a) of Title 28 relating to removal of actions, in which a general prohibition is laid down against the removal to the federal courts of civil actions brought in state courts under the Federal Employers' Liability Act.

The revisor's note to Section 1404 (a) is indicative of the intention of the legislature and reads as follows:

> "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." Title 28, United States Code, Congressional Service, p. 1853.

The attention of the legislators was specifically directed to the revisor's notes with regard to contemplated changes in venue provisions in the new Judicial Code (H. Rep. 308, Title 28, United States Code, Congressional Service, p. 1692, at p. 1697, which accompanied H. R. 3214, later enacted into the new Code; Statement of Rep. Eugene J. Keogh, Hearing before Subcommittee No. 1 of the House Judiciary Committee on H. R. 1600 and H. R. 2055, Title 28, United States Code, Congressional Service, pp. 1947-1948) and Judge Galston, a Member of the Judicial Conference Committee

on Revision of the Judicial Code, refers to the *Kepner* case in connection with the drafting of the change of venue section (Galston, An Introduction to the New Federal Judicial Code, 8 F. R. D. 201, 206). These references to the *Kepner* case leave no doubt that the new Section 1404 (a) was enacted with the express purpose in mind of changing the pre-existing rule that in cases under the Federal Employers' Liability Act the plaintiff's choice of a forum could not be defeated on the basis of *forum non conveniens.*

Professor Moore, author of Moore's Federal Practice, and special consultant on the revision of the Judicial Code to the publishers of the United States Code, Annotated, speaking before the House Subcommittee holding hearings on H. R. 2055, the forerunner of H. R. 3214, the final draft of the new Code, indicated clearly the change made in venue provisions. He said:

> "Venue provisions have not been altered by the revision. Two changes of importance have, however, been made. Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead the district court is to transfer the case to the proper venue. See section 1406. And section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice; and the provision for change of venue on the grounds of convenience is also embodied in the Bankruptcy Act for corporate reorganization, section 118, Eleventh United States Code, section 518." (Hearings before Subcommittee No. 1 on H. R. 2055, Title 28, United States Code, Congressional Service, p. 1969.)

Professor Moore's views are weighty, not only because of his eminence in this field generally, but because, as consultant to the publishers of the Annotated Code, he was adviser to those who, in collaboration with the Congressional Committee on Revision of the Laws, were entrusted with the preparation of the bill which became Title 28 (See letter from Hon. Harvey T. Reid, Editor-in-Chief of West Publishing Co., Hearings before Subcommittee No. 1 on H. R. 2055, Title 28, United States Code, Congressional Service, 1971-1972; Remarks of Representative Sam Hobbs, Title 28, United States Code, Congressional Service, p. 1986, and Floor Discussion, id, p. 1993).

There is already authority for the application of Section 1404 (a) of the new Code to cases arising under Congressional statutes allowing the plaintiff the privilege of selecting his forum. While the Supreme Court, prior to the enactment of the new Code, in *United States* v. *National City Lines*, 334 U. S. 573, held that the judicial doctrine of *forum non conveniens* was not applicable to suits where venue is chosen pursuant to Section 12 of the Clayton Act, District Judge Yankwich in the District Court for the Southern District of California subsequently applied Section 1404 (a) in that very case and transferred the action to a district more suitable. *United States* v. *National City Lines*, 17 U. S. L. W. 2167 (October 12, 1948). Similarly, in an excellent opinion by Judges Nordbye and Joyce in the District Court of Minnesota, Section 1404 (a) has been held applicable to an action instituted to recover for injuries under the Federal Employers' Liability Act. *Hayes, et al.* v. *Chicago, Rock Island and Pacific Railroad Company* (unpublished opinion, District Court for the District of Minnesota, Fourth Division, September 25, 1948).

Plaintiff points out that the Jennings Bill,[1] also before the 80th Congress, and specifically designed to remedy the frequent inequity in bringing suits in distant and unsuitable forums under the venue provisions of the Federal Employers' Liability Act, was not enacted, and from this plaintiff argues that it cannot be assumed that Section 1404 (a) of the Judicial Code was intended to apply in such cases.

Why the Jennings Bill was not enacted, seems immaterial, but it is entirely possible that Congress felt such a law unnecessary for the very reason that such change as was deemed desirable would follow from Section 1404 (a) of the new Code. Moreover, the proposed Jennings Bill was in no sense a mere statutory enactment of the doctrine of *forum non conveniens*. It was designed to require suit to be brought in the jurisdiction in which the cause of action arose, or in which the person suffering death or injury resided at the time it arose, and to withdraw from the plaintiff any choice of forum except in cases where the de-

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1. The Jennings Bill provided that the second paragraph of Section 6 of The Federal Employers' Liability Act be amended by eliminating the broad power of the plaintiff to select the forum in which the action would be tried. It then proceeded to amend Section 51 of the old Judicial Code (28 U. S. C. 112) as follows:

"A civil suit for damages for wrongful death or personal injuries against any interstate common carrier by railroad may be brought only in a District Court of the United States or in a State Court of competent jurisdiction, in the district or county (parish), respectively, in which the cause of action arose, or where the person suffering death or injury resided at the time it arose:

"*Provided*, that if the defendant cannot be served with process issuing out of any of the Courts aforementioned, then and only then, the action may be brought in a District Court of the United States, or in a State Court of competent jurisdiction, at any place where the defendant shall be doing business at the time of the institution of said action."

The bill was passed by the House, 93 Cong. Rec., 9193, but only reached committee stage in the Senate.

fendant could not be reached with process in either of the two aforementioned jurisdictions. No such situation is created by the new Judicial Code. The plaintiff is still allowed, under Section 6 of the Federal Employers' Liability Act, to select, from all the forums in the country permitted him under the statute, that one which seems to him most preferable. But the legislative history of the Judicial Code and the broad language of Section 1404 (a) demonstrate that such choice on his part does not exempt him from the power of the court, after due consideration of the convenience of witnesses, parties and the interests of justice, to transfer the case to a more suitable place for trial.

The contention made by the plaintiff that the new Judicial Code was not intended to apply to pending actions is not sound. Not only would such a holding interject into every case in which the new Code is to be applied the extraneous, and sometimes difficult, issue of whether or not the case is "pending" [See *Truncale* v. *Universal Pictures Corp.*, 11 Fed. Rules Serv. 24 c 3, Case 1; *Russo* v. *Sofia Bros.*, 2 F. R. D. 80; *Liken* v. *Shaffer*, 64 F. Supp. 432; *Hackner* v. *Guaranty Trust Co. of New York*, 117 F. (2d) 95], but it would be contrary to the generally accepted rule that statutes relating to procedure apply to pending as well as future actions. *Railroad Co.* v. *Grant*, 98 U. S. 398; *Hallowell* v. *Commons*, 239 U. S. 506; *Benas* v. *Maher*, 128 F. (2d) 247. So far, the courts have treated the new Judicial Code in no different manner from any other procedural legislation in this respect. See *United States* v. *National City Lines, supra; Hayes, et al.* v. *Chicago, R. I. & P. Rd. Co., supra.*

Section 1404 (a) is applicable to this case, despite the fact that venue is laid under Section 6 of the Federal Employers' Liability Act. The facts plainly indicate that the transfer is necessary for the convenience of the parties and

witnesses and that it is in the interest of justice that the transfer be made. The case is therefore transferred to the District Court of the United States for the Southern District of Iowa, Central Division.

Plaintiff's cross-motion for injunction is denied. Settle order on notice.

November 9, 1948.

SAMUEL H. KAUFMAN
United States District Judge

Opinion of Judge Rayfiel in Pascarella v. New York Central dated November 19, 1948

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 8942

JOHN A. PASCARELLA,

Plaintiff,

—vs.—

THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendant.

OPINION

APPEARANCES:

C. AUSTIN WHITE, ESQ.,
Attorney for Defendant,
For the Motion.

MESSRS. BLANK & BORDEN,
Attorneys for Plaintiff,

By WILLIAM A. BLANK, ESQ., of Counsel,
In opposition to Motion.

RAYFIEL, *D. J.*:

The plaintiff, an employee of the defendant railroad company, commenced this action under the Federal Em-

ployers' Liability Act (United States Code, Title 45, Sections 51 et seq.) to recover damages for injuries sustained by him during the course of his employment.

The defendant now moves for an order transferring the said action to the United States District Court for the Northern District of Ohio, Eastern Division thereof. The said motion is made pursuant to the provisions of Section 1404(a) of Title 28 of the United States Code, which became effective on September 1, 1948. The said section provides that a District Court may, "for the convenience of parties and witnesses, and in the interest of justice, transfer any civil action to any other district or division where it might have been brought."

The defendant states that the plaintiff, a resident of Ohio, suffered the injuries which are the subject matter of this action while working as a brakeman in Youngstown, Ohio; that the defendant expects to call as witnesses on the trial of the action several members of the train crew of which the plaintiff was a member, as well as several car inspectors and physicians, all of whom are employed or reside in or near Youngstown, Ohio; and that the United States District Court for the Northern District of Ohio, Eastern Division thereof, is held in the City of Youngstown, Ohio.

The plaintiff opposes this motion, contending, first, that the said Section 1404(a) does not apply to actions brought under the Federal Employers' Liability Act, and, second, that if it should be held that it does, then it is not applicable to actions pending on its effective date, to-wit, September 1, 1948.

For many years the doctrine of "forum non conveniens" has been enforced in the Federal Courts, but it has been uniformly held that it is inapplicable to actions brought under the Federal Employers' Liability Act. In the case of

Baltimore & Ohio R. R. Co. v. Kepner, 314 U. S. 44, the Court, referring to Section 6 of the said Act, said (at page 54), "* * * a privilege of venue granted by the legislative body which created this right of action cannot be frustrated by reasons of convenience or expense. If it is deemed unjust the remedy is legislative * * *". To the same general effect, see also *Miles* v. *Illinois Central R. R. Co.*, 315 U. S. 698, and *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501. In the latter case, an ordinary tort action, not brought under the Federal Employers' Liability Act, the Court, in applying the doctrine of "forum non conveniens," said (at page 505), "It is true that in cases under the Federal Employers' Liability Act we have held that the plaintiff's choice of a forum cannot be defeated on the basis of 'forum non conveniens.' But this was because the special venue act under which these cases are brought was believed to require it". *Baltimore & Ohio R. R.* v. *Kepner*, 314 U. S. 44; *Miles* v. *Illinois Central R. R.*, 315 U. S. 698.

No question is raised as to this Court's jurisdiction of this action or of the parties. There are two questions involved here: first, whether Section 1404(a) of Title 28 of the United States Code applies to all civil actions, including actions brought under the Federal Employers' Liability Act; and, second, whether the defendant has established reasons of convenience of parties and witnesses which would justify the transfer of this action. If the first question is answered in the negative the second need not be considered.

Since no specific reference is made in the new Title 28 of the United States Code to actions brought under the Federal Employers' Liability Act, it becomes necessary to ascertain what the Congress intended when it enacted Section 1404(a) of Title 28 of the United States Code. All of the provisions of Title 28 of the new Code appear in one

chapter, headed "Chapter 87—District Courts; Venue," consisting of Sections 1391 to 1406, inclusive. The first section (1391) deals with venue generally, while several of the remaining sections contain provisions for venue in other specific civil actions, such as actions (1) by a national banking association against the comptroller of the currency, (2) to recover a fine, penalty or forfeiture, (3) for the collection of internal revenue taxes, and several others. It is my opinion that the provision in the said Section 1404(a) authorizing the District Court to transfer "*any* civil action * * *" (emphasis added) refers only to the civil actions enumerated under the aforementioned Chapter 87, and not to those actions for which special venue provisions and privileges are created by statute, except, of course, those venue statutes which were specifically repealed by the new Code.

Section 39 of the enacting act of New Federal Judicial Code reads in part as follows:

> "The sections or parts thereof of the Revised Statutes of the United States or statutes at large enumerated in the following schedule are hereby repealed."

There follows a schedule comprising many hundreds of sections of various statutes, but neither Section 6 nor any other provision of the Federal Employers' Liability Act appears among them.

Where the Congress did intend to make Section 1404(a) applicable to statutes containing specific venue provisions it accomplished that purpose in unmistakable language. For instance, it provided (by Section 1409(a) of Title 28, under the heading "Chapter 87—District Courts; Venue") that the transfer procedure effected by Section 1404(a)

should apply to copyright cases and consequently repealed Section 35 of Title 17, providing therefor.

An examination of the reviser's notes and the hearings and report of the committee which considered the bill which eventually became the New Federal Judicial Code, indicates that the various sections under Chapter 87 thereof (affecting venue), were intended to effect completeness or clarity in the statutes which they were designed to replace, or provided changes in the phraseology thereof. Specifically, Section 1404, according to the said notes, was a consolidation of Sections 119 and 163 of Title 28, U. S. C., 1940 Ed. with necessary changes in phraseology and substance, and neither of said sections referred to actions commenced under the Federal Employers' Liability Act. The mere reference in said notes to the case of *Baltimore & Ohio R. R. Co.* v. *Kepner*, *supra*, does not justify the conclusion that the Congress intended by said section to deprive an employee of a railroad of the special and substantive right of venue granted him by Section 6 of the Federal Employers' Liability Act.

Hon. John Jennings, Jr., a member of the House of Representatives, introduced a bill in the first session of the 80th Congress (H. R. 242) providing for the amendment of Section 6 of the Federal Employers' Liability Act, so as to limit venue in actions brought thereunder. Thereafter, but in the same session, he introduced a substitute bill (H. R. 1639) less drastic in its provisions, but designed to accomplish the same general purpose. It provided that in certain eventualities, which need not be here considered an action under the said Act could be brought only in the district or county in which the accident occurred, or in which the employee suffering injury or death resided at the time when the accident occurred.

At the opening of the hearings before the subcommittee of the Committee on the Judiciary of the House of Representatives, the sponsor of the bills asked that H. R. 242 be not considered, inasmuch as he was interested only in the passage of H. R. 1639. The hearings were quite extensive, and the record thereof consists in large part of the oral testimony of representatives of various Bar Associations and attorneys for several railroad companies, and copies of resolutions adopted by the Bar Associations of many of the states advocating the limitation of venue of actions commenced under the Federal Employers' Liability Act.

The general purport of the testimony and resolutions was to the effect there existed widespread solicitation of cases under the Act as well as other unethical practices, and that a comparatively small group of law firms, generally in the more populous states, represented employee plaintiffs in a substantial percentage of the cases brought thereunder. It was urged that the limitation of venue provided for in H. R. 1639 would eliminate or substantially reduce those evils. It was also urged by the proponents and supporters of the bill that the prosecution of these actions in large cities remote from the scene of the accidents has resulted in what were referred to as exorbitant verdicts for the employees. Opponents of the bill argued that if the first contention is correct, it would be more advisable and proper for the constituted authorities to institute disciplinary proceedings than to impose restrictions and limitations on the injured employee. As to the second contention, the bill's opponents criticised the standard which was employed to justify the opinion or conclusion that the verdicts were exorbitant. They urged, on the contrary, that the verdicts recovered in other jurisdictions provided entirely inadequate compensation for the injuries suffered by employees.

The Jennings bill was being considered by the Congress during the same period that it had the New Federal Judicial Code under advisement. The Jennings bill failed to pass the Congress. It seems fair to assume, therefore, that it was not the intent of the Congress to give such sweeping significance and import to Section 1404(a) of the New Federal Judicial Code as the defendant contends.

There are several additional facts and circumstances which in my judgment justify the opinion that it was not the intent of the Congress to apply Section 1404(a) of the New Federal Judicial Code to actions under the Federal Employers' Liability Act.

My distinguished colleague, District Judge Galston, a member of the Judicial Conference Committee on Revision of the Judicial Code, in his "Introduction to the New Federal Judicial Code," 8 Fed. Rules Decisions, 201, said:

> "As the title of the bill indicates, the object of the Congress was to revise and codify existing law. The temptation in so doing to incorporate new matter was at times very great; *but the rule of Exclusion stated in its broadest terms was to reject anything of a controversial nature.* In consequence the bill as it was introduced in the closing days of the second session of the 79th Congress expressed the efforts of the draftsmen to simplify, consolidate, rearrange, rephrase and indeed streamline former Title 28."

And then, further:

> *"The breadth of the survey of Titles other than Title 28 of the United States Code is indicated in the present act* in the schedule of laws repealed." (Emphasis added.)

Charles J. Zinn, Esq., Law Revision Counsel to the Committee on the Judiciary of the House of Representatives, in a statement made before the said Committee, said, inter alia (see pages 1980 and 1981 of the West Publishing Company's Publication—United States Code, Congressional Service—):

> "In the work of revision, principally codification, as we have done here, keeping revision to a minimum, I believe the rule of statutory construction is that a mere change of wording will not effect a change in meaning unless a clear intent to change the meaning is evidenced,"

and:

> "People who are afraid that we are changing the law to a great extent need not worry particularly about it."

At page 1945 of said publication Hon. Eugene J. Keogh, a member of the House of Representatives, and a former Chairman of the House Committee on the Revision of the Laws, said:

> "The policy that we adopted, which in my mind has been carefully followed by the revisers and by the staff of the publishing companies, was to avoid wherever possible the adoption in our revision of what might be described *as controversial substantive changes of law.*" (Emphasis added.)

Many other statements to the same general effect, made by members of Congress and others, appear in the said

publication and in the Report of the Committee and the record of the hearings held before it.

The failure to make specific reference to Section 6 of the Federal Employers' Liability Act, or at least to include the said section in the aforementioned schedule or table of laws repealed, appears to confirm the opinion of this Court that it was not the intent of the Congress to make Section 1404(a) of the New Federal Judicial Code applicable thereto.

The said Section 1404(a), except to the extent that it applies to those venue provisions contained in Chapter 87, aforementioned, merely makes statutory the doctrine of "forum non conveniens." To make it applicable to actions under the Federal Employers' Liability Act would be to negative the aforementioned decisions of the Supreme Court, and I am unwilling to agree that that was the intent of the Congress.

Granting venue rights under Section 6 of the Federal Employers' Liability Act was a meaningful and purposeful exercise of legislative prerogative by Congress, and should be taken away only by an equally specific discharge of its legislative function. I do not think that Section 1404(a) of the new code accomplished that purpose. The 81st Congress is about to meet in session, and will have an opportunity to clarify the situation here involved.

Since it is the opinion of this Court that Section 1404 (a) is not applicable to actions brought under the Federal Employers' Liability Act, it becomes unnecessary to consider the question of convenience raised by the defendant.

Accordingly, the motion is denied. Settle order on notice.

Dated: November 19, 1948

LEO F. RAYFIEL,
U. S. D. J.

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TABLE OF CASES CITED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 233 Miscellaneous

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent,

Ex Parte JESSIE A. KILPATRICK,

Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Statement

By his motion for leave to file a petition for a writ of mandamus directed to the Honorable John C. Knox, United States District Judge for the Southern District of New York, or a petition for a writ of certiorari to the United States District Court for the Southern District of New York, petitioner seeks to have this Court review an order of the United States District Court for the Southern District of New York entered on November 22, 1948. This

order (Appendix to Petition, pp. iii-iv) denied the petitioner's motion for a trial preference in an action brought under the provisions of the Federal Employers' Liability Act (45 U. S. C. A. §§51-60), and granted, in the exercise of the Court's judicial discretion, the respondent's cross-motion to transfer the trial of this action to the United States District Court for the Northern District of Texas, Fort Worth Division. The petitioner's complaint states that he is a resident of nearby Big Spring, Texas, where the accident occurred which gave rise to this action to recover damages in the sum of $300,000.

The petitioner seeks to invoke this Court's jurisdiction directly. He has neither appealed this order to the Court of Appeals for the Second Circuit, nor petitioned that Court for a writ of mandamus directed to Judge Knox.

Grounds of Respondent's Opposition to the Motion

Respondent opposes this motion on the following grounds:

1. The petitioner's contentions with respect to the exclusion of Federal Employers' Liability Act cases from the scope of §1404(a) of Title 28, United States Code, are clearly lacking in merit.

2. Petitioner has made no prior application for the same relief to the Court of Appeals for the Second Circuit.

3. There is no element of such vital public importance as to warrant this Court in exercising its discretion in petitioner's favor.

4. This Court lacks jurisdiction to grant the relief requested, for clearly the most that the petition shows

is error in the exercise of conceded judicial power, not usurpation of judicial power by the District Court.

5. The power of this Court is sought to be invoked, not in aid of its appellate jurisdiction, but only as a substitute for an appeal not permitted by statute.

ARGUMENT

POINT I

The petitioner's contentions with respect to the exclusion of Federal Employers' Liability Act cases from the scope of Section 1404(a) of Title 28, United States Code, are clearly lacking in merit.

It is doubtful, to say the least, whether the Court has jurisdiction to pass upon this motion (*infra* pp. 10-13). However, respondent turns first to the question whether §1404(a) of Title 28, United States Code, embraces an action brought under the provisions of the Federal Employers' Liability Act (45 U. S. C. §§51-60).

For the purposes of this motion, and in the interest of brevity, respondent will stand upon the scholarly and lucid opinions by Judge Kaufman in *Nunn* v. *Chicago, Milwaukee, St. Paul and Pacific R. Co.* (S. D. N. Y., November 9, 1948, Appendix to Petition pp. vi-xiv), and by Judges Nordbye and Joyce in *Hayes* v. *Chicago Rock Island and Pacific R. Co.*, 79 F. Supp. 821 (D. C. Minn. September 25, 1948), relied upon by Judge Knox in the instant case.

Respondent presented to Judge Knox on the argument of this motion below certain legislative source material concerning §1404(a), not called to the attention of either Judges Nordbye, Joyce, Kaufman or Raytiel, which clearly shows the intention of Congress that the statutory phrase

"any civil action" includes a civil action brought under the Federal Employers' Liability Act.

Appended to the report on the revised code submitted by the Committee on the Judiciary of the House of Representatives (H. Rept. No. 308, 80th Cong. 1st Session, April 25, 1947) were the reviser's notes to each section together with accompanying tables. "These [notes] explain in great detail the source of the law and the changes made in the course of the codification." S. Rept. No. 1559, 80th Cong., 2d Session, June 9, 1948, p. 2. The reviser's note to Section 1404(a) states that the section was drafted "in accordance with the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper." "As an example of the need of such a provision," the reviser specifically cited *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, "which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio."

The reference to this Court's opinion in the *Kepner* case is not accidental. In fact, the history of the reviser's note conclusively shows that §1404(a) was designed to give a district court the discretion to transfer in precisely the situation presented in that case.

The Second Draft of the Code, together with the reviser's notes thereto, was circulated by the reviser during the spring of 1945 to the Advisory Committee, the Judicial Conference Committee, the Judicial Consultant, Judge Parker, and the Special Consultants, Judge Holtzoff and Professor James W. Moore, as well as to every member of the legislature and the Federal judiciary. The members of the committees, together with the consultants and the revision staff, met at Hershey, Pennsylvania for three days at the end of May, 1945 to consider this draft "section by section," to discuss "all the questions which had arisen in

the course of their preparation," and to reach decisions "for the guidance of the staff in the further revision of the drafts." In addition to eminent advisory committees, "Prof. James W. Moore, author of Moore's Federal Practice and Chairman Eugene J. Keogh of the House Committee on Revision of the Laws made important contributions to the discussions. Our committee can attest to the extremely thorough and full consideration which was given by this advisory group to every doubtful point which arose in the court [sic] of the work." (Statement of Hon. Albert B. Maris, United States Circuit Judge for the Third Circuit, at hearing before Subcommittee No. 1 of the House Judiciary Committee, March 7, 1947, 28 United States Code, Congressional Service, p. 1958.)

The language of Section 1404(a) in this Second Draft was similar to that finally enacted by Congress, but the reviser's note was somewhat different. It read then as follows:

> "Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper. The author gave as an example for the need of such a provision *Baltimore & Ohio R. Co. v. Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

Professor Moore has kindly furnished counsel with a copy of the memorandum referred to, in which he wrote to the reviser with reference to the doctrine of *forum non conveniens*:

> "Improper venue results in the dismissal of an action in the federal courts if the point is timely made. I think this result can no longer be justified in this era of easy communication and travel. Provision should be made for transfer when an objection of improper venue is sustained, probably with the imposition of costs and possibly a reasonable attorney's fee. Then I believe we should go further and give some recognition to the doctrine of *forum non conveniens* and permit a court to transfer the case, even though the venue is proper, to a more convenient forum. In my opinion the District Court for the Eastern District of New York should have had the power in the situation presented in the *Kepner* case, 314 U. S. 44, 62 S. Ct. 6, to transfer the action under the Federal Employer's Liability Act to a federal court in Ohio where the accident occurred and the employee resided and which would have been a proper venue."

In Volume 3, *Moore's Federal Practice* (*Second Edition*), published December, 1948, there is an extensive discussion of §1404(a) which the author concludes as follows (§1949, p. 2141):

> "The Judicial Code Revision did not change the underlying basic principles of venue. It did, however, make some substantial changes and certainly put venue on a more workable basis. It adopts the principle of forum non conveniens, but provides for a transfer, not dismissal, of *any* action to a proper and more convenient forum."

In a footnote to this text, Professor Moore states (p. 2141, note 107):

> "*Any* action in §1404(a) includes suits subject to special venue statutes, as suits for patent infringement and suits under the Federal Employers' Liability Act, as well as actions subject to the general venue statute."

This explanation of the reference to the *Kepner* case in the reviser's note, together with the fact that the clear and unambiguous language of §1404(a) stood untouched throughout three years' consideration of the code revision by Congressional groups and expert advisory committees, is indicative of the legislative intent that this new statute should include within its scope civil actions brought in the district courts under the Federal Employers' Liability Act (*United States* v. *National City Lines, Inc.*, 334 U. S. 573, 596-7).

POINT II

Petitioner has made no prior application for the same relief to the Court of Appeals for the Second Circuit.

Conceding merely for purposes of argument that this Court would have jurisdiction under §1651(a) of Title 28, United States Code, to grant this motion for leave to file a petition for a writ of mandamus or certiorari, petitioner's motion, made prior to any application in the Court of Appeals for the Second Circuit, should be denied. The correct rule is stated in *Ex Parte Peru*, 318 U. S. 578 (at p. 584):

> "And ever since the statute vested in the circuit courts of appeals appellate jurisdiction on direct appeal from

the district courts, this Court, in the exercise of its discretion, has in appropriate circumstances declined to issue the writ to a district court, but without prejudice to an application to the circuit court of appeals (*Ex parte Apex Mfg. Co.*, 274 U. S. 725; *Ex parte Daugherty*, 282 U. S. 809; *Ex parte Krentler-Arnold Hinge Last Co.*, 286 U. S. 533), which likewise has power under §262 of the Judicial Code to issue the writ. *McClellan* v. *Carland*, 217 U. S. 268; *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269."

While it is true that in the *Peru* case this Court entertained a motion for leave to file a petition for a writ prior to application in the Court of Appeals, the late Chief Justice Stone made it clear that it was only the public importance and exceptional character of that claim of sovereign immunity which called for the exercise of the Court's discretion to issue the writ, rather than to relegate a friendly sovereign power the court of appeals. There, the clash between the executive branch of the government which had certified sovereign immunity, and the judicial branch which had refused to recognize the certification, required action by this Court. Obviously, no such extraordinary circumstances are presented here.

In *United States Alkali Export Association, Inc.* v. *United States*, 325 U. S. 196 and *De Beers Consolidated Mines Ltd.* v. *United States*, 325 U. S. 212, suits in equity by the United States under §4 of the Sherman Act (15 U. S. C. §4), this Court entertained petitions for writs of certiorari to the district court in the first instance because sole appellate jurisdiction lay in this Court under §29 of the Act (15 U. S. C. §29). Therefore, it was said in the *Alkali Export Association* case that "application for a common law writ in aid of appellate jurisdiction must be

to this Court" (*supra*, p. 202). The late Chief Justice Stone, however, reaffirmed the rule of *Ex Parte Peru*, as applicable to all cases of which this Court does not have *sole* appellate jurisdiction (*ibid.*):

> "In the usual case this Court will decline to issue a writ prior to review in the Circuit Court of Appeals, whether by ordinary appeal, *In re Tampa Suburban R. Co.*, 168 U. S. 583, 588, or by an extraordinary remedy, see *Ex parte Peru, supra*, 584."

POINT III

There is no element of such vital importance as to warrant this Court in exercising its discretion in petitioner's favor.

Again assuming this Court's jurisdiction, the petitioner's motion for leave to file a petition for a common law writ directed to the Honorable John C. Knox, United States District Judge for the Southern District of New York, should be denied upon the ground that the petitioner does not show that he is entitled to the relief requested.

Obviously, the only effect of this order of transfer is that the petitioner will present his cause of action for damages to a federal court and jury in Fort Worth, Texas, rather than to a court and jury in New York City. It is hard to see how the petitioner will be prejudiced in any legal sense by this transfer; in fact, he may be able to subpoena necessary witnesses for a trial in Fort Worth, Texas, whose presence he could not secure at a trial in New York City. In any event, the petitioner's motion does not present "a really extraordinary cause" which would entitle him to the drastic and extraordinary remedy sought herein (*Ex Parte Fahey*, 332 U. S. 258, 260).

POINT IV

This Court lacks jurisdiction to grant the relief requested, for clearly the most that the petition shows is error in the exercise of conceded judicial power, not usurpation of judicial power by the District Court.

The petitioner must base his application for the drastic and extraordinary remedy sought by this Petition upon the assertion that the order of transfer entered in the District Court was "beyond the power of the District Judge" (Petition, p. 6), his contention being "that the court has no judicial power to do what it has done and that its action was not merely error but a usurpation of power."

However, the petitioner also argues that §1404(a) of Title 28, United States Code, effective September 1, 1948, giving discretion to a district court to transfer "any civil action," for the convenience of parties and witnesses, and in the interest of justice, to any other district where it might have been brought, has no application whatsoever to a civil action brought under the Federal Employers' Liability Act (Brief pp. 14-15). Thus, the legal principles excluding the application of the doctrine of *"forum non conveniens"* to such cases are said not to have been altered in any way by the new statute. Yet, prior to September 1, 1948, the effective date of the new statute, it must be conceded that Judge Knox would have had the *judicial power* to dismiss this action on the ground of *forum non conveniens*, even though his decision would have been erroneous (*Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 505, and cases cited therein). Therefore, it is quite obvious that the petitioner's complaint is not connected with usurpation of judicial power by the District Court, but merely with an alleged misconstruction of the statute in the exercise of conceded judicial power.

Accordingly, this Court lacks jurisdiction, and the extraordinary relief requested should be denied upon this ground alone (*Ex Parte Chicago R. I. & Pac. Ry. Co.*, 255 U. S. 273, 279-80; *Roche v. Evaporated Milk Association*, 319 U. S. 21, 26-32; *United States Alkali Export Association, Inc. v. United States*, 325 U. S. 196, 202).

POINT V

The power of this Court is sought to be invoked, not in aid of its appellate jurisdiction, but only as a substitute for an appeal not permitted by statute.

Section 1651(a) of Title 28, United States Code states that this Court and all courts established by Act of Congress may issue all writs:

> "* * * *necessary or appropriate in aid of their respective jurisdictions* agreeable to the usages and principles of law."

The statutory authority of this Court to issue writs of mandamus or certiorari to district courts can be constitutionally exercised only in so far as such writs are in aid of its appellate jurisdiction. (*Ex Parte Peru*, 318 U. S. 578, 582.) This Court also has power to issue the writ, even though direct appellate jurisdiction is vested in the court of appeals, if this Court has ultimate discretionary jurisdiction by certiorari (*Ex Parte Peru, supra*, at pp. 584-5).

These rules do not cover the exercise of this Court's jurisdiction in the instant case, for the Court of Appeals for the Second Circuit is not vested by statute with direct appellate jurisdiction over this order of transfer. Therefore, this Court has no power to act in aid of an appellate jurisdiction that likewise could not exist.

The order entered herein by the district court merely transfers the trial of this action to Texas. The order is

not final in any respect, as regards the merits of the case. In petitioner's view, the "matter involved lies outside the issues of the case". (Petition, p. 5). We believe that the Court of Appeals for the Second Circuit would be without appellate jurisdiction, since it may only review, with exceptions not here material, "appeals from all final decisions" of the district courts, except where a direct review may be had in this Court (28 U. S. C. §1291; cf. *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 29-30).

The non-appealability of this type of transfer order was recognized recently by this Court in *United States* v. *National City Lines, Inc.*, 334 U. S. 573. Commenting upon a previous order of transfer which had been entered upon defendants' motion in a companion criminal anti-trust suit, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, Mr. Justice Rutledge said (at p. 594):

> "Moreover, it is at least doubtful whether the Government had a right to appeal from the order of transfer in the criminal case."[43]

Consequently, the petitioner is merely attempting to prevail upon this Court to "substitute mandamus for an appeal contrary to the statutes and the policy of Congress." *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 32. As the late Chief Justice Stone wrote for a unanimous Court in the *Roche* case (p. 30):

> "Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Con-

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[43] The precise point apparently has not arisen since the adoption of Rule 21(b), but there would seem to be no statutory basis for an appeal from an order of this type. See 18 U. S. C. A. §682. See also *Semel* v. *United States*, 158 F. (2d) 231, 232."

gressional policy against piecemeal appeals in criminal cases. *Cobbledick* v. *United States*, 309 U. S. 323. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review. 'The effect therefore of this mode of interposition would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times before there could be a final judgment.' *Bank of Columbia* v. *Sweeney*, 1 Pet. 567, 569. See also *Life & Fire Insurance Co.* v. *Adams*, 9 Pet. 573, 602; *Ex parte Hoard*, 105 U. S. 578, 579-80; *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379."

CONCLUSION

The petitioner's motion for leave to file a petition for a writ of mandamus to the Honorable John C. Knox, United States District Judge for the Southern District of New York, should be denied; the alternative motion for leave to file a petition for a writ of certiorari to the United States District Court for the Southern District of New York should be denied.

Dated: New York, N. Y., December 3, 1948.

Respectfully submitted,

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Supreme Court of the United States

BRIEF IN SUPPORT OF PETITION, SUPPLEMENTING SUMMARY CONTENTIONS IN ORIGINAL BRIEF DATED NOVEMBER 25, 1948

INDEX AND SUMMARY OF CONTENTIONS

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B. The House of Representatives finally passed the Jennings Bill by a close margin of eight votes 10 days after it had passed the revision.

C. The heated debate on the Jennings Bill in the House just 10 days after the passage of the revision without any reference therein to Section 1404(a) demonstrates a total absence of Congressional intent to make Federal Employers' Liability Act cases transferable.

D. A contraction of employees' rights under the Federal Employers Liability Act would reverse long-term Congressional trends.

POINT V

The granting of invulnerable venue rights under Section 6 of the Federal Employers' Liability Act was a meaningful and purposeful exercise of legislative prerogative by Congress. It could only be taken away by an equally specific discharge of the legislative function. The Generalities in a revision do not accomplish that purpose. The District Judge lacked the power to make an order transferring this action out of the Southern District of New York and should be directed to nullify it 20

Table of Cases Cited

Other Authorities Cited

IN THE

Supreme Court of the United States

October Term, 1948

No. 233—Miscellaneous

Summary Docket

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION, SUPPLEMENTING SUMMARY CONTENTIONS IN ORIGINAL BRIEF DATED NOVEMBER 23, 1948

Statutes Involved

Section 6 of the Federal Employers' Liability Act (as amended in 1910—45 U. S. C. A. 56), in relevant part provides:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of

the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Section 1404(a) of the revised Judicial Code, effective September 1, 1948 (28 U. S. C. A. 1404(a)), provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been tried."

Issue Involved

The narrow issue involved on the merits is whether or not the revised Judicial Code (28 U. S. C. A. 1404(a)) empowers a District Judge to transfer an action brought under the Federal Employers' Liability Act (45 U. S. C. A. 51-56).

POINT I

It was completely settled prior to the enactment of the revised Judicial Code that the choice of venue under the Federal Employers' Liability Act was not subject to discretionary impairments by the courts.

The present special venue provision of the Federal Employers' Liability Act[1] was passed by an amendatory act of Congress on April 5, 1910 and gave an unqualified choice to an injured railroad worker to select as the venue for the prosecution of the remedy which the Act established for him, any district where the defendant was doing busi-

1 45 U. S. C. A. 56.

ness at the time of the commencement of the action. After 38 years of embittered litigation in both Federal and State courts, an interpretation of this special venue provision as being of the essence of that remedy and of the general humanitarian purposes thereof, was accomplished and became well settled.

The judicial awareness of the inviolability of this choice became so well crystallized that contemporary courts have spoken of the choice of venue afforded to the injured workman as a "substantive right".[2]

The minimal conclusion that may be drawn from the decisions of this Court is that the choice of venue given an injured railroad employee was purposeful and not subject to debilitation by the exercise of discretionary judicial powers.

Baltimore & Ohio R. Co. v. *Kepner* (1941), 314 U. S. 44;

Miles v. *Illinois Central R. R. Co.* (1942), 315 U. S. 698;

Gulf Oil Corporation v. *Gilbert* (1947), 330 U. S. 501, 503;

Kilpatrick and Parker v. *Texas & Pacific Railway Co.* (1948), 166 F. (2d) 788, cert. den. October 11, 1948.

In the *Kepner* case, *supra*, the Court was faced with what would be in ordinary litigation a vexatious and un-

2 *Akerly* v. *New York Central R. R. Co.*, C. A. 6th Circuit, 168 F. (2d) 812, 814 (1948).

Fleming v. *Husted* (1946), 68 F. Supp. 900, D. C., S. D. of Iowa.

Compare with *Sherman* v. *Pere Marquette Rwy.* (1945) 62 F. Supp. 590, in which the Court refers to the choice of venue as an "adjective right" (page 593) but adds: "The beneficial effects of the statute should not be whittled away by the courts by distinguishing between adjective and substantive rights", and states that adjective rights are frequently as important as substantive rights.

conscionable choice of venue, plus a power in the court below to exercise discretion. The Court said (page 51):

> "Under such circumstances, petitioner asserts power, abstractly speaking, in the Ohio Court to prevent a resident under its jurisdiction from doing inequity. Such power does exist."

This Court said further, however, that the grant of the venue privilege by Congress could only be diminished by Congress, as distinguished from the courts, and in the same manner as it had been previously established, *viz*: by the amendment to Section 6 of the Federal Employers' Liability Act of April 5, 1910.

From *Miles* v. *Illinois Central R. R. Co., supra,* we single out the lucid rationale of the considerations which may very well have motivated Congress in granting to the injured railroad employee such wide selectivity in choosing venue.[3]

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3 "Unless there is some hidden meaning in the language Congress has employed, the injured workman or his surviving dependents may choose from the entire territory served by the railroad any place in which to sue, and in which to choose either a federal or a state court of which to ask his remedy. There is nothing which requires a plaintiff to whom such a choice is given to exercise it in a self-denying or large-hearted manner. There is nothing to restrain use of that privilege, as all choices of tribunal are commonly used by all plaintiffs to get away from judges who are considered to be unsympathetic, and to get before those who are considered more favorable; to get away from juries thought to be small-minded in the matter of verdicts, and to get to those thought to be generous; to escape courts whose procedures are burdensome to the plaintiff, and to seek out courts whose procedures make the going easy.

That such a privilege puts a burden on interstate commerce may well be admitted, but Congress has the power to burden. The Federal Employers' Liability Act itself leaves interstate commerce under the burden of a medieval system of compensating the injured railroad worker or his survivors. He is not given a remedy, but only a lawsuit. It is well understood that in most cases he will be unable to pursue that except

We do not deem it material whether the Congress in 1910 adequately perceived the full extent of the utility to the injured railroadman of the choice of venue as discussed in Mr. Justice Jackson's separate concurring opinion. While his analysis is valuable for its realism and accuracy and its appraisal of the social desirability of permitting the broad choice of venue, its true importance here is that it furnishes a bill of particulars on the finding implicit in the majority opinions in *Kepner* and *Miles* that the grant of venue rights was a purposeful exercise of the legislative prerogative by Congress.

There is no distinction in legal contemplation between a judicial interference with the choice of venue based upon the ground that the choice of venue is generally unconscionable and inequitable, that it would constitute an undue burden on interstate commerce or upon the ground that it is violative of the doctrine of *forum non conveniens*.

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by splitting his speculative prospects with a lawyer. The functioning of this backward system of dealing with industrial accidents in interstate commerce burdens it with perhaps two dollars of judgment for every dollar that actually reaches those who have been damaged, and it leaves the burden of many injuries to be borne by them utterly uncompensated. Such being the major burden under which the workmen and the industry must function, I see no reason to believe that Congress could not have intended the relatively minor additional burden to interstate commerce from loading the dice a little in favor of the workman in the matter of venue.

It seems more probable that Congress intended to give the disadvantaged workman some leverage in the choice of venue, than that it intended to leave him in a position where the railroad could force him to try one lawsuit at home to find out whether he would be allowed to try his principal lawsuit elsewhere. This latter would be a frequent result if we upheld the contention made in this case and in the *Kepner* case. I think, therefore, that the petitioner had a right to resort to the Missouri court under the circumstances of this case for her remedy."

JACKSON, J.

Miles v. *Illinois Central R. R. Co.*, 315 U. S. 698, 706.

That this Court is of like mind is apparent from the majority opinion in *Gulf Oil Corporation* v. *Gilbert*[4] and from the denial of certiorari to the Second Circuit in the *Kilpatrick* case, in which the Court of Appeals had said that any considerations of *forum non conveniens* were unconditionally eliminated from Section 6 (of the Federal Employers' Liability Act).

Nor do we perceive any difference for the purpose of construing legislative intent[6] in the light of the decisions of the Supreme Court, whether the mechanics of the impediments thrust at the choice of venue by a District Judge are dismissals or transfers. If in fact the choice of venue filled the entire field and cannot be frustrated for reasons of convenience or expense, it makes no difference whether the frustration is accomplished via a dismissal or transfer.

In 1948, at the time when Congress enacted the Judicial Code, there was a well established recognition in the courts that the grant of privilege of choosing venue in Federal Employers' Liability Act cases was purposefully benign toward the injured workman and not subject to impairment, impediment or disturbance by the exercise of conflicting inherent judicial powers.

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4 *Supra*, 505.

5 *Supra*, 790.

6 Of Section 1404(a) of the New Judicial Code (28 U. S. C. A. 1404(a)).

POINT II

The general purposes of the revision of the Judicial Code militate against a construction that Congress intended therein to empower District Judges to emasculate the right to choose venue, which it had previously conferred upon injured railroad men.

Section 1404(a) of the Judicial Code, by which the district judge believed he had been empowered to frustrate the venue selection made by the plaintiff below, became law as the result of the revision of the Judicial Code, and it is therefore pertinent to examine the nature of the enactment accomplishing that revision and its legislative history, with a view toward ascertaining if there be any feature thereof which would lend credence to the assumption of such a Congressional intent. We find nothing but evidence to the contrary.

Other than revision and codification, the major purpose of the enactment was to make Title 28 actual law rather than merely *prima facie* evidence thereof. The enactment itself is an act to "revise, codify and enact into law Title 28 of the United States Code".[7]

The general intendment of the revision was given detailed clarification in House Report 308 of the 80th Congress, First Session,[8] by which Congress was told:

> "Revision, as distinguished from codification, required the substitution of plain language for awkward terms, reconciliation of conflicting laws, repeal of superseded sections, and the consolidation of related provisions."

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7. Chapter 646, Public Law 773, approved June 25, 1948, effective September 1, 1948.

8. United States Code, Congressional Service, Title 28, page 1693.

Obviously, there was no necessity for a "revision" of the venue provision of the Federal Employers' Liability Act on that basis.

The report continues and discusses venue changes in such a manner as to clearly negate in the mind of a Congressman, had such question arisen, that there was an intention to make vulnerable the choice of venue as provided in the Federal Employers' Liability Act. The report stated:[9]

> "So also, minor changes were made in the provisions regulating the venue of district courts, in order to clarify ambiguities or to reconcile conflicts. These are reflected in the reviser's notes under Sections 1391 to 1406."

What Congress had authorized and believed it was passing upon was an expert revision and recodification;[10] the court below attributes to the panel of expert revisers hired for that purpose, an expropriation of authority clearly not given them to make changes in the highly controversial field of private rights between railroads and injured railroad employees.

The law enacting the revision was presented to both the House[11] and Senate[12] via the consent calendar; rules were suspended and the Bill passed practically without debate[12a]

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9 *Id.*, page 1697.

10 House Resolution 388, introduced October 5, 1939: "Revision of the Federal Judicial Code", Vol. 48 Law Notes p. 11; House Report 308, 80th Congress, 1st Session, United States Code Congressional Service, Title 28, p. 1695; Report of Attorney General Clark, *id.* p. 1699.

11 House Resolution 3214, passed July 7, 1947.

12 Passed on June 12, 1948.

12a The sole controversy centered about Tax Court provisions which were thereupon eliminated from the revision.

and without opposition. The reported comment of Congressmen indicate an intention not to legislate in any controversial fields. Senator Donnell, in presenting the Bill to the Senate, said:[13]

> "The purpose of this bill is primarily to revise and codify and to enact into positive law, with such corrections as were deemed by the Committee to be of substantial (sic) and non-controversial nature."

The counsel for the House Committee on the Revision of the Laws, Charles J. Zinn, Esq., testified before the Sub-Committee of the House Judicial Committee on March 7, 1947. He said:[14]

> "People who are afraid that we are changing the law to a great extent need not worry particularly about it."[15]

Congressman Keogh, Chairman of the Committee originally in charge of the Bill, said at that time:[16]

> "The policy that we adopted, which in my mind has been very carefully followed by the revisers and by the staffs of the publishing company as well as the employees of the Committee, was to avoid wherever possible and whenever possible the adoption in our revision of what might be described as controversial substantive changes of law. * * * We proceeded upon

13. United States Code Congressional Service, Title 28, p. 2020.

14. *Id.*, page 1981.

15. *Id.*, page 1945.

16. *Id.*, page 1950.

> the hypothesis that since that was primarily a restatement of existing law, we should not endanger its accomplishment by the inclusion in the work of any highly controversial changes in law."[17]

The Senate Report emphasized the non-controversiality of the revision. It said:[18]

> "Many non-controversial improvements have been affected * * *. At the same time, great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval."

In spite of the general nature of the legislation and in disregard of the limitations on the responsibilities and even the authority of the expert revisers, and oblivious to the record representations to Congress that the changes in the Code were non-controversial, it is nevertheless asserted that a Congressional intent to affect Federal Employers' Liability Act cases can be spelled from the fact that appended to the proposed legislation, which itself consisted of some 2,681 sections, there were revisers' notes and that in the revisers' note to Section 1404(a), a Federal Employers' Liability Act case is referred to as an illustration of the need for such a provision.

In the Congressional Service pamphlet, to which footnote references have been made herein, the Reviser's Notes themselves occupy some 236 printed pages as compared with the 152 pages of the actual Code.

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17 *Id.*, page 1950.

18 Senate Report 1559, 80th Congress, *id.*, page 1676.

The fallaciousness of extracting a Congressional intent from *such* revisers' notes is underscored by the comment of Congressman Robsion, the Chairman of the Committee, when he testified at the hearing on the legislation conducted by Sub-Committee 1 of the House Judiciary Committee on the Revision:[19]

> "You can never reach a time when the members of Congress will read a bill like that and then turn to all the hundreds and hundreds of references, the various statutes, to see whether they are correct or have been repealed, and perhaps we will not get many of them to read H. R. 2055[20] which contains over 170 pages."

Congressman Devitt, a member of the Committee testifying at the same hearing, said:[21]

> "I emphasize the professional standing and ability of the authors of this work because I know it is not humanly possible for the members to read every word or even every section of the bill and that of necessity great reliance must be placed upon the integrity and caliber of the persons who did the work."

If Congressmen in passing on an expert revision of this character are not expected to read carefully the actual enactment of length 152 pages, is it not a *reductio ad absurdem* to charge them with having read the 236 pages of revisers' notes which accompanied the legislation?

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19 *Id.*, page 1941.

20 Supplanted by H. R. 3214.

21 United States Code Congressional Service, Title 28, page 1942.

Even if there be a grant that this revisers' note should be singled out for judicial examination the note must, if it is to be ascribed even the least importance, contain a clear and unambiguous statement of the intention of the revisers. But the revisers' note does not state that Section 1404(a) applies to Federal Employers' Liability Act cases. The reference to the *Kepner* case in the revisers' note is capable of an entirely different construction; a construction far more consistent with what one would anticipate the intendment of the revisers to be in their character as a group of expert draftsmen, to wit:

In Chapter 87 of the revision, of which Section 1404(a) is a part, the revisers had compiled numerous venue provisions, all except that in Section 1391 being of the "special" variety. Mr. Justice Frankfurter had pointed out in his dissent to *Kepner*[22] that there is nothing to distinguish literally a special venue provision from a general venue provision. Two judges of this Court had concurred with that dissenting view. Having redrafted these numerous "special" venue provisions the revisers may have feared that, without more, it was within the realm of possibility for the courts on the authority of the *Kepner* precedent to construe each enactment as having filled the entire field of venue in whatever particular classification of litigation was involved, and that the courts had thereby been deprived of their inherent equitable powers to invoke the doctrine of *forum non conveniens* or apply other inherent equitable powers to the venue choice. The revisers therefore may have believed as draftsmen that there was the need, if the doctrine of *forum non conveniens* was to be preserved, to incorporate in Chapter 87, along with the numerous "special" venue provisions, the "saving" pro-

22 314 U. S. 44, 62.

vision that in those cases the doctrine of *forum non conveniens* could be applied and the cases transferred.[23]

It is the far more credible and consistent view that the revisers, in selecting *Baltimore & Ohio* v. *Kepner* as the illustration of the need for such a provision, were thinking in terms of draftsmanship rather than the equities between railroads and their injured employees.

We submit that the ambiguity of the revisers' note is sufficiently patent, particularly when considered in the context in which it was presented to Congress, to bar the assertion that it represents any evidence of an intention to render illusory the right to choose venue in Federal Employers' Liability Act cases. The evidence afforded by the reports to the House and Senate, as well as the general purpose of the statute itself, strongly suggest that there was no Congressional intent to disturb those fields of litigation where, in the delicate adjustments of rights and liabilities, the choice of venue represented a valuable and pivotal point of balance.

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23 The history of the revisers' note bears out this thesis since it was prepared prior to October 30, 1945 and has been unchanged ever since the preliminary draft of the revision was originally sent to the Sub-Committee of the House by the Committee's counsel, Mr. Zinn, under date of October 30, 1945. The Court will recall, of course, that *Gulf Oil Corporation* v. *Gilbert*, *supra*, was not decided until 1947.

POINT III

By the use of the words "any civil action" in Section 1404(a) there was intended any civil action referred to in Chapter 87 of Title 28.

Chapter 87 of the revised Judicial Code is entitled: "District Courts; Venue". In this chapter, following the general venue provision,[24] there are assembled special venue provisions covering "banking association actions against the Controller of currency",[25] "proceedings to recover fines, penalties or forfeitures",[26] "recovery of Internal Revenue taxes",[27] "interpleader",[28] "enforcement of Interstate Commerce Commission orders",[29] "partition actions involving the United States",[30] "patents and copyrights",[31] "stockholders derivative actions",[32] "Federal Tort Claims Act cases",[33] and "condemnation proceedings".[34]

The combination of words "any civil action", by actual count, appear in Chapter 87 prior to its use in Section 1404(a), on 13 occasions. Where used in Chapter 87 prior to its use in Section 1404(a) it is modified. As illustrations: "any civil action by a national banking association" (1394), "any civil action for the collection of Internal Revenue taxes" (1396), "any civil action of interpleader" (1397), "any civil action for patent infringement" (1400), etc.,

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24 28 U. S. C. A. 1391.
25 *Id.*, 1394.
26 *Id.*, 1395.
27 *Id.*, 1396.
28 *Id.*, 1397.
29 *Id.*, 1398.
30 *Id.*, 1399.
31 *Id.*, 1400.
32 *Id.*, 1401.
33 *Id.*, 1402.
34 *Id.*, 1403.

etc. Section 1404(a), however, simply reads that a district court may transfer "any civil action" without modification.

Under these circumstances, it is imprudent to ascribe extraordinary significance to the use of the words "any civil action". The use of the words "any civil action" in the context found here is at best ambiguous and unclear. The ambiguity is resolved by the application of elementary presumptions of statutory construction.

Although the term "any civil action" is, of course, broad enough to include Federal Employers' Liability Act cases, it is to be construed as having no application or effect upon a special enactment. The special enactment is deemed to be an exception to the general provision.

> "Where there are two statutes, upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal or an absolute incompatability, that the special is intended to remain in force as an exception to the general. (*Townsend* v. *Little*, 109 U. S. 504, 512; *Ex Parte Crow Dog*, *id.* 556, 570; *Rogers* v. *Texas*, 185 U. S. 83, 87-89.)"[35]

We submit that the venue provisions which are reenacted in Chapter 87 are all of the civil actions in which the Court is empowered to apply the doctrine of *forum non conveniens*. We believe that the few omissions were purposeful. Beside the Federal Employers' Liability Act, the venue provision under the Anti-Trust Laws is excluded. There is no re-enactment of the venue provision of the Bankruptcy Law, but in that law itself there is contained a provision for transfer of proceedings on the ground of *forum non conveniens*.[36]

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35 *Washington* v. *Miller*, 235 U. S. 422, 428 (1914).

36 11 U. S. C. A. 518.

POINT IV

The District Judge ignored the known temper of Legislative Opinion and Congressional action on the Jennings Bill underscored the absence of Congressional intent to affect venue under the Federal Employers' Liability Act by enacting the revision of the Judicial Code.

> "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes, or in the known temper of legislative opinion."[36a]

While there may be an area for disagreement in the minds of reasonable men as to the ultimate conclusions which may be drawn from the fact that the Jennings Bill,[37] which sought to restrict the choice of venue in Federal Employers' Liability Act cases, passed the House in the 80th Congress but did not reach the floor in the Senate, the record debate and literature on this proposal demonstrably establish that the subject matter was provocative of a vast plethora of divergent and mutually exclusive views.[38]

36a Some Reflections on the Reading of Statutes by Mr. Justice Frankfurter (Cardozo lecture of March 18, 1947), Vol. 2 The Record of the Association of the Bar of the City of New York, p. 229.

37 H. R. 1639; 80th Congress.
H. R. 242 and H. R. 6345; 79th Congress.

38 See testimony before Subcommittee #4 of the House Committee on the Judiciary on H. R. 1639 given on March 28, April 1, 14 and 18, 1947 (compare testimony of J. Carter Fort, Vice Pres. and General Counsel of the Association of American Railroads, and John W. Freels, General Attorney of the Illinois Central Railroad, on the one hand, with Harry See, National legislative representative of the Brotherhood of Railroad Trainmen, Warren H. Atherton, Esq., special counsel, Brotherhood of Railroad Trainmen, A. F. Lyon, Executive Secretary, Railway Labor Executives Assn., Jonas A. McBride, Vice President and national legis

The House of Representatives just did barely pass[39] the Jennings Bill on July 17, 1947 *ten days after it had passed the revision containing Section 1404(a) without debate;* the debate on the floor of the House on the Jennings Bill consumes some 15 pages of the Congressional Record[40] but not one word was said to indicate that the

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lative representative, Brotherhood of Locomotive Firemen & Enginemen, and W. D. Johnson, vice-president and national legislative representative, Order of Railway Conductors of America, on the other; Some 16 labor groups expressed opposition. 37 Bar Associations expressed views but *not* on the form in which the House passed the bill; as indicated there were three bills in the House and H. R. 1639 was amended before passage; at least 3 articles appeared in the American Bar Association Journal alone, viz: *Bill to Curb "Shopping" for Forums Is Urged,* Gay 33 A. B. A. J. 659; *Substitute for Jennings Bill Is Urged,* Devitt 34 A. B. A. J. 454; *Statement* by Frederick W. Brune, 34 A. B. A. J. 457 (June 1948). Oddly, Mr. Devitt urged that since "H. R. 1639 would patently discriminate against the Rail Worker, a substitute which would effectuate the operation of the doctrine of *Forum Non Conveniens* should be considered." Mr. Brune, who as chairman of the American Bar Association's Committee on Jurisprudence and Law Reform wrote in defense of H. R. 1639 as passed, said: "Perhaps the strongest objection to placing the matter of venue in FELA cases in exactly the same position as venue in ordinary civil cases is the one pointed out by Mr. Justice Jackson in his concurring opinion in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, where he spoke of the possibility that an injured railroad worker might be forced to 'try one lawsuit at home to find out whether he would be allowed to try his principal lawsuit elsewhere'. A similar possibility would exist in any case in which a motion to dismiss on the ground of *forum non conveniens* had to be fought out as a preliminary to a trial on the merits."

39 The Roll Call vote was

Yeas	— 203
Nays	— 188
Present	— 1
Not Voting	— 38

93 Cong. Rec. 9193.

40 93 Cong. Record 9178-9193. During the debate the "Devitt Amendment" proposing that choice of venue in FELA cases be made subject to the doctrine of "Forum Non Conveniens" was argued on the floor of the House and defeated.

The railroads and bar associations urged restrictions in venue choice to prevent "abuses" by a small group of the bar. The testimony before

House had just ten days prior thereto passed the revision containing Section 1404(a).

Two observations are manifestly irrebutable:

1. When Congress passed the revision in reliance on the representations that what changes there were in the venue provisions of the Judicial Code, were of a "minor" and "non-controversial" nature, it could not have had in mind the venue provisions of the Federal Employers' Liability Act.

2. If Congress had actually intended to affect the venue provision of the Federal Employers' Liability Act in the Judicial Code, at least one Congressman could have been expected to observe that the lengthy and stormy debate on the Jennings Bill was unnecessary in view of the passage of the revision ten days earlier.

While the Senate failed to pass the Jennings Bill and did pass the Revision, it is the record in the House, paradoxically, which more clearly establishes the legislative intent not to affect Federal Employers' Liability Act venue by Section 1404(a).

When viewed in broad perspective, there is an implicit finding in the decision of the District Judge of a Congressional intent to reverse the entire current of legislative enactment and judicial interpretation thereof by the Supreme Court. For 41 years, without a single backward step, what legislative changes there have been in the Fed-

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the Subcommittee disclosed however that during the 5 years 1941-45 when there were a total of 211,057 casualties including 4943 deaths, the number of cases alleged by the railroads to reflect objectionable practices was 2500. The instant litigation was cited by the railroads as objectionable because of the distance involved in the choice of venue. (House hearings on H. R. 1639, pp. 119, 121).

eral Employers' Liability Act have each tended to liberalize the rights and remedies of the injured workman."

Congress had consistently manifested in the past a recognition of the burdens, obstacles and disadvantages which have beset the injured railroad worker in his efforts to obtain his one dollar out of every two dollars of judgment under the "backward system" of compensating for industrial accidents in this exceedingly hazardous occupation. The modern and liberal trend of legislative enactments by Congress were at least limited responses to the perception that the railroad and the injured worker do not come before the judicial tribunal with equal opportunity.[42] The development of the Federal Employers' Liability Act was contemporary with the enactment by practically every State in the Union of Workmen's Compensation Laws, which imposed liability without fault on employers.

There was a total absence of *indicia* that Congress intended a reversal of its long and well established benevolent policy toward injured railroad workers. Such intent cannot be lightly presumed, as was manifestly done by the District Judge.

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41 Amendment to Section 51 of August 11, 1939, Chapter 685, Section 1, 53 Stat. 1404, broadened the definition of an employee.

Amendment to Section 54 of August 11, 1939, C. 685, Section 1, 53 Stat. 1404, eliminated assumption of risk as a defense to actions based on negligence.

The Statute of Limitations, as set forth in Section 56, was changed from 2 to 3 years by the Act of August 11, 1939, Paragraph 2 thereof.

Section 60 was added on the same date, establishing a penalty for suppression of information relating to industrial accidents by the carriers.

42 The injured employee has the burden of proving negligence and of producing evidence, frequently unobtainable and in the hands of the railroads who own and control the premises and equipment involved. The witnesses are under the control and general supervision of the railroad in most instances. The railroad is enabled to make an early and thorough investigation of the occurrence, etc.

POINT V

The granting of invulnerable venue rights under Section 6 of the Federal Employers' Liability Act was a meaningful and purposeful exercise of legislative prerogative by Congress. It could only be taken away by an equally specific discharge of the legislative function. The generalities in a revision do not accomplish that purpose. The District Judge lacked the power to make an order transferring this action out of the Southern District of New York and should be directed to nullify it.

Dated: January 13, 1949.

Respectfully submitted,

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